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ARBITRATION AND THE NATIONAL LABOR RELATIONS BOARD: AN EXAMINATION OF PREFERENCES AND PREJUDICES AND THEIR RELEVANCE

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The author conducted interviews among labor relations practitioners in order to identify current preferences and prejudices toward arbitration and the National Labor Relations Board. In this article he analyzes his findings and their impact on both institutions. His analysis contains many insights into the practical operation of both decision making processes and provides an empirical foundation for evaluating each institution.

I. INTRODUCTION

Secretary of Labor W. Willard Wirtz has said that "the enforceability of democratic law depends in the long run upon whether it is respected."[1] Since in this country highly individualistic employers, employees, and unions make a "group of arrangements" which, to a large extent, determines our labor relations,[2] respect for labor laws is not only hard to engender, it is difficult to measure.[3] It is not difficult to evaluate the late Michael J. Quill's statement, made during the recent New York City transportation dispute, that "the judge can drop dead in his black robes and we would not call off the strike. We will defy the injunction

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1 Statement made while a Professor of Law at Northwestern University. Wirtz, "Board Policy and Labor-Management Relations: 'Employer Persuasion,'" N.Y.U. 7th Ann. Conference on Lab., 79, 106 (1954). *Cf.* Leedom, "The Scope of Collective Bargaining," Address before University of Chicago Seminar on Collective Bargaining, April 16, 1963, Release #916 (Industrial relations often a 'dog eat dog business').

2 Slichter, "The American System of Industrial Relations: Some Contrasts with Foreign Systems," in Potentials of the American Economy, Selected Essays of Sumner H. Slichter 271, 272 (Dunlop ed. 1961).

3 *See* McCulloch, "The NLRB in Action," Address before Eighth Annual Joint Industrial Relations Conference of Michigan State University, April 19, 1962, reported in 49 LRRM 74 (complex and constantly changing patterns and problems of employer-employee relations).

and go to jail."[4] Unfortunately, from the academic point of view, much more subtle attitudes and defiances of law exist. One method of determining "respect" is to examine the beliefs and behaviors of those who participate in labor relations. However, the impact of these attitudes on the legal process is not readily apparent although nonetheless significant.[5] The relationship of "respect" and its impact on labor law can be brought into focus by considering the manner in which the beliefs and behavior of the parties involved in labor relations affect their use of the institutions created and regulated by those who make labor laws. The purpose of this paper is to investigate preferences and prejudices toward two such institutions, arbitration and the National Labor Relations Board (NLRB).

A. *The Reasons for Including Arbitration and the NLRB in One Study*

Obviously separate and continuing study of these institutions is warranted because the legislative policy of the United States favors both NLRB protection and voluntary dispute settlement, for example, arbitration, as methods of promoting industrial stabilization.[6] The

[4] N.Y. Times, Jan. 5, 1966, p. 1, col. 8. The unfortunate and ironic aspect of this statement by the head of the Transport Workers Union is well known.

[5] *See generally* Jones, "Impact Research and Sociology of Law: Some Tentative Proposals," 1966 Wis. L. Rev. 331. *Cf.* Ball & Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View," 17 Stan. L. Rev. 197, 208-09 (1965) (compliance with economic regulations not wholly determinable by approval or dissapproval of regulated) referred to in Jones, *supra* at 338, note 13.

[6] National Labor Relations Act, 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), and 73 Stat. 519 (1959), 29 U.S.C. § 151. For convenience the sections cited will hereinafter be referred to and cited as they appear in Cox & Bok, 1966 Statutory Supplement to Cases on Labor Law (6th ed. 1966) and popularly known.

Sec. 1:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 8(a): It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Sec. 10(a): The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . . Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 168.

Sec. 203(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

statistical involvement of each institution in labor relations also merits such research. It can be estimated that in 1961 there were approximately 141,000 grievance arbitration clauses in collective bargaining agreements in this country.[7] The figures published by the NLRB indicate that in 1965 over 26,000 cases were filed with them.[8] However, neither the legislative policy nor the statistics cited indicate why joint study on an institutional basis is desirable.

Joint consideration can be justified legalistically because of the interplay between the arbitral process and the "unfair labor practice" jurisdiction of the National Labor Relations Board (Board). The interaction may arise after a company and a union representing its employees negotiate a collective bargaining agreement providing for arbitration of contractual grievances. Where a dispute arises that is susceptible to both arbitration and Board adjudication, the question becomes one of the proper channelization of the dispute. Under what circumstances and when should company and union disagreement be channeled to arbitration, and/or the Board?[9] For example, refusal to bargain is proscribed

Arbitration is not mentioned in § 203(d) of the Labor-Management Relations Act, see Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-67 (1959) for judicial construction. *See also* United Steelworkers v. Warrier & Gulf Nav. Co., 363 U.S. 574, 578 (1960) (federal policy to promote collective bargaining—major factor in industrial peace is arbitration clause).

[7] The number of collective bargaining agreements was estimated to exceed 150,000 covering almost 17 million employees in 1961. Fleming, "The Labor Arbitration Process in Labor Arbitration," in Labor Arbitration-Perspectives and Problems 34 (Kahn ed. 1964) [hereinafter cited as 1964 Proceedings NAA]. Estimate of grievance arbitration clauses in collective bargaining agreements in 1961 was 94%. U.S. Dep't of Labor, "Major Union Contracts in the United States," 1961 1, Bull. No. 1353 (1962).

[8]

Case Intake By ULP Situations & Representative Petitions*

Year (Fiscal)	*Number*	*% Increase*
1959**	18,440 cases	—
1960	19,284 "	+04%
1961	21,151 "	+10%
1962	23,246 "	+10%
1963	23,924 "	+03%
1964	25,761 "	+08%
1965	26,648 "	+03%

* Unfair Labor Practice

** 1958 was omitted because of disparate increase of 3,745 cases between 1958-1959. Figures shown and percentages compiled from 29th Annual Report of NLRB (1964), p. 5.

[9] This issue is part of the larger problem of channelization to the courts, arbitration, and/or the NLRB, or leaving the dispute to be resolved by the parties themselves. *Compare* National Labor Relations Act, 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), and 73 Stat. 519 (1959), 29 U.S.C. § 160(a), § 10(a) ". . . this power (Board's

as an "unfair labor practice" by the National Labor Relations Act (Wagner Act) as amended.[10] The Board is empowered to prevent such practices.[11] On the other hand, where the scope of the statutory duty to bargain collectively is bound up with a threshold question of contract interpretation, the legislative policy has been judicially determined to favor arbitration.[12] The Labor-Management Relations Act of 1947 (Taft-Hartley Act),[13] section 203(d),[14] favors final adjustment by a method agreed upon by the company and union who are parties to the agreement, for example, arbitration. This interplay between the arbitral forum and Board determination does not indicate that the two are alternative forums.[15] Section 10(a) of the National Labor Relations Act, as amended, negates such a concept by providing that the Board's power to prevent unfair labor practices ". . . shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . . ."[16] Nor is this a

power to prevent any person from engaging in unfair labor practice) shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." *with* Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§173(d), 185(a), 203(d) "Final adjustment by a method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ," *and* § 301(a) suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[10] 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 29 U.S.C. § 158(a), § 8(a) "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[11] National Labor Relations Act, 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), and 73 Stat. 519 (1959), 29 U.S.C. § 160(a).

[12] *See, e.g.*, Square D Co. v. N. L. R. B., 332 F.2d 360. 366 (9th Cir. 1964) (Board order would frustrate act's policy of promoting industrial stabilization through collective bargaining); Sinclair Refining Co. v. N.L.R.B., 306 F.2d 569, 570-71 (5th Cir. 1962) (Board adjudication of grievance dispute clashes with policy of effectuating contractual methods).

[13] 61 Stat. 136 (1947), 29 U.S.C. § 151.

[14] 61 Stat. 136 (1947), 29 U.S.C. § 173(d), § 203(d) "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ."

[15] *See* Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1963) (no question that Board is not precluded from adjudicating unfair labor practices). *Cf.* Smith v. Evening News Association, 371 U.S. 195, 199-01 (1962) (Board jurisdiction does not preclude suit in federal court).

[16] Section 10(a), 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 29 U.S.C. § 160(a).

situation where the Board's jurisdiction preempts arbitration.[17] The problem is one of accommodating the various statutory provisions. Individuals, companies, unions, and NLRB counsel, by probing for guide lines in this sensitive area, have shifted from the Board[18] to the United States Courts of Appeals,[19] and to the Supreme Court of the United States.[20]

Undoubtedly there are reasons mitigating against continued research in this area. One reason is that these issues are being dealt with by judicial determination. However, this begs the question of whether the courts are the appropriate forum to resolve the policy issues that underlie the development of appropriate guide lines. At present there is no indication that the courts will deviate from their ad hoc resolution by narrow guide lines. Nor is there any indication that the parties will adhere to this type of solution. Another reason that suggests that continued research would be futile is that much has already been written on this subject.[21] Even though most of these efforts have been by the traditional law review case-by-case, problem-by-problem analysis, these studies have the advantage of examining the broader spectrum of the impact of one solution on another. However, such research overlooks the effect of suggested solutions on those who are governed, and the contrapuntal impact by those regulated on these resolutions. Perhaps the most serious objection to further study is pragmatic. Most cases

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[17] *See* Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 Colum. L. Rev. 52 (1957); Feinberg, "The Arbitrators Responsibility Under the Taft-Hartley Act," 18 Arb. J. (n.s.) 77 (1963); Sovern, "Section 301 and the Primary Jurisdiction of the National Labor Relations Board," 14 Lab. L.J. 132 (1963); Wollet, "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?" 10 Lab. L.J. 477 (1959).

[18] *E.g.*, Operating Engineers, Local 18 [Frazier Davis Construction Co.], 145 N.L.R.B. 1492, 1493-94 (1964) (arbitration decision not repugnant to Act); International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962), *aff'd sub nom.* Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir.), *cert denied*, 377 U.S. 1003 (1964) (Board has discretion to reject arbitration award); I. Oscherwitz and Sons, 130 N.L.R.B 1078, 1079-80 (1961) arbitration findings fair and regular); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1090 (1955) (Board established standards of reviewing arbitration decisions).

[19] *E.g.*, Square D Company v. N.L.R.B., *supra* note 12; Sinclair Refining Company v. N.L.R.B., *supra* note 12; Timken Roller Bearing Co. v. N.L.R.B., 161 F.2d 949, 954 (6th Cir. 1947) (Board has no power to police collective bargaining contracts).

[20] *E.g.*, N.L.R.B. v. Acme Industrial Co., 87 S. Ct. 564 (1967) (Board order to provide information prior to taking grievance through arbitration permitted). *Cf.* N.L.R.B. v. C & C Plywood Corp., 87 S. Ct. 559 (1967) (Board did not exceed jurisdiction by construing collective bargaining agreement absent arbitration clause).

[21] *See* Lesnick, Arbitration as a Limit on the Discretion of Management, Union, and NLRB: The Year's Major Developments," in Proceedings On N.Y.U. 18th Ann. Conference On Lab. 7 (BNA 1966); note 12 *supra.*

that go to the Board have nothing to do with the collective bargaining stage since they arise prior to union organization, and, therefore, cannot go to arbitration.[22] Likewise, most cases that go to arbitration do not form the basis of meritorious charges with the Board. This objection quantitatively challenges the significance of the interplay of arbitration and Board determination on labor relations. On the other hand, Board Chairman Frank W. McCulloch stated that "statistics are not available to indicate the number of times that a party resorts to arbitration in preference to filing a charge with the Board . . . [he was] sure that this was true in the majority of situations."[23] Even though this is not responsive to the question of how many times the alternative is available, it does require an answer as to why this preference. On balance it must be admitted that consideration of the interplay may be esoteric, but there are additional reasons that justify continued research.

The social interest in the interplay between the two processes arises from the interaction of public and private policy. An explanation of this nexus is contained in the "rights theory."[24] Although the "rights" provided for by the federal labor law statutes are exercised by private parties filing charges with the Board, these rights are considered "public" and within the jurisdiction of the NLRB.[25] However, the theory explains, when the Wagner Act[26] established "public rights" they were quickly adopted into collective bargaining agreements as "private rights," and were frequently so enmeshed that it was impossible to separate them.[27] When the Board deals with "public rights"

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22 This assumption cannot be supported by empirical data because the Board does not break down unfair labor practice cases by stage of organization.

23 McCulloch, "Arbitration and/or the NLRB," 18 Arb. J. (n.s.) 3, 4 (1963).

24 *See generally* Christensen, "Arbitration, Section 301, and the National Labor Relations Theories," 37 N.Y.U.L. Rev. 411 (1962).

25 Amalgamated Workers v. Edison Co., 309 U.S. 261, 269 (1940) (Board seeks enforcement as public agent not to give effect to private administrative remedy). National Labor Relations Board, Rules and Regulations and Statements of Procedure, Series 8, as amended, revised Jan. 1, 1965, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 [hereinafter cited as 'Rules and Regs'] Sec. 102.9—"A charge that any person has engaged in or is engaging in any unfair labor practice may be *made by any person*" (emphasis added). *Contra*, "Unfair labor practice cases are private law suits—nothing more." Congressman Landrum, 109 *Cong. Rec.* 15198 (daily ed. Aug. 27, 1963).

26 49 Stat. 449 (1935).

27 Christensen, *supra* note 24, at 443; Miller, "Malaise in the Administrative Scheme: Some Observations on Judge Friendly's Call for Better Definition of Standards, 9 How. L.J. 68, 76-77 (1963) (as line between private and public activity blurs so does line between public and private law). Note that the tribunitial attributes of an agency are not

that are also a breach of contract or when the arbitrator deals with "private rights" that are also a violation of statute, the rationale of this distinction is limited and the rights are mixed. The social policy expressed by the statute may also be muted. This may be merely another way of expressing the interplay issue discussed previously. However, positing the question in this manner pinpoints the policy issue. What is the social policy behind the establishment of "public rights," and is it effectuated through the exercise of "private rights"? For example, when the parties agree to arbitration as a manner of dispute resolution in the collective bargaining agreement, what social policies should prompt the Board to defer to arbitration? Chairman McCulloch acknowledged Board deference to arbitration as the desideratum by stating that it was the,

> experience-tested means of settling disputes in the administration of contracts, often far better adopted than the Board to quick resolution, to comprehending practical plant situations, to devising remedies of greater flexibility, and to taking account of the special unique needs of the on-going, day-to-day relationship of the parties to collective compacts.[28]

His statement indicates that where the parties have worked out a provision to arbitrate their disputes, "experience" warrants Board deference. This opinion has been subject to severe criticism lately.[29] The conflicting attitudes of knowledgeable participants in labor relations toward the arbitration process and Board adjudication bears investigation.

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analogous to the arbitral forum because: (1) arbitration is not a public tribunal, (2) arbitrator has no general charge to administer justice for community which transcends parties, and (3) arbitrator is part of system of self-government established by collective bargaining agreement.

[28] McCulloch, "The Arbitration Issue in National Labor Board Decisions," 19 Arb. J. (n.s.) 134, 136 (1964).

[29] Including Board Insistence that deference is discretionary. N.L.R.B. v. Huttig Sash and Door Company, Inc., 154 N.L.R.B. No. 67 (1965), No. 18451 (8th Cir. 1966). *See generally* Hays, Labor Arbitration a Dissenting View, (Yale 1966). *See also* Fleming, The Labor Arbitration Process (Ill. 1965); Ross, "Distressed Grievance Procedures and Their Rehabilitation," in Labor Arbitration and Industrial Change 104 (Kahn ed. 1963) [hereinafter cited as 1963 Proceedings NAA]; Stowe, "Comments on Arbitration," in Proceedings of N.Y.U. 19th Ann. Conference on Labor, as reported in 61 LRR 243, 245 (1966). For other citations of growing criticism of arbitral process, see Jones & Smith, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments," 62 Mich. L. Rev. 1115, 1152 n.2 (1964) [hereinafter cited as Jones & Smith, "Report with Comments"]. *Cf.* Lesnick, *supra* note 21, at 25-36 (delays might impair statutory rights).

B. *Arbitration and the NLRB: Some Contradictory Observations*

1. Arbitration: The Douglas-Hays' Opinions

Mr. Justice Douglas opined that,

> the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment .... [T]he parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[30]

In a recent book Judge Paul R. Hays of the United States Court of Appeals, Second Circuit, bluntly expressed his dissent.[31]

> It is the submission of this book that there is no authority to support the view of arbitration adopted in the *Steelworkers* cases. [*supra*] There have been no extensive studies of the arbitration process that would establish the validity of the propositions advanced in those cases. (All italicized in original.)[32]

This disagreement goes far beyond refuting the empiric evidence on which Mr. Justice Douglas' statements are based. Judge Hays charges that "in literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, or intelligence, or character."[33] "A system of adjudication," he continues, "in which the judge depends for his livelihood or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system."[34] He concludes,

> there are certain procedural advantages in arbitration which some would want to see preserved. There is nothing about those procedural aspects that makes them indissolubly a part of a private system of judicial administration. They could all be readily adapted to a public system of justice and made available in our courts.[35]

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30 United Steelworkers v. Warrier & Gulf Nav. Co., *supra* note 6, at 582.

31 Hays, *op. cit. supra* note 29.

32 *Id.* at 9.

33 *Id.* at 112.

34 *Ibid. Compare* Mr. James Hoffa's statement, "arbitrators split it down the middle, half for you, half for me. If they don't they get scratched off the list the next time somebody needs an arbitrator." Baltimore Evening Sun, Jan. 29, 1957, cited in 9 Lab. L.J. 187, 194 (1958).

35 Hays, *op. cit. supra* note 29 at 116.

To accept *either* view in this dispute is to fall prey to Judge Hays' admonition that there is insufficient evidence to support (or deny) these propositions. Furthermore, to accept one side and shunt the other is to ignore the personal observation of a knowledgeable participant in labor relations and obviate analysis.

2. NLRB Adjudication: Landrum-Griffin-The Board

Congressman Robert P. Griffin stated in 1961, in a separate view appended to the Report of the Subcommittee on National Labor Relations Board of the Committee on Education and Labor, that "delays by the Board in case handling has been a problem since its inception."[36] During a 1962 speech delivered to the House of Representatives, Congressman Phil M. Landrum argued that,

> the adjudication of cases has been entrusted by Congress to the NLRB . . . The law spells out in definite terms the conduct which constitutes . . . unfair labor practices . . . Congress not the labor Board determines America's labor-management policy . . . /the Board has/a judicial role, not a policy making role.[37]

One year later, when Congressman Landrum introduced a bill to divest the Board of its adjudicative function by transferring jurisdiction over unfair labor practices to the federal district courts,[38] his justification was that "Congress has been patient, tolerant, and helpful to the NLRB for more than 25 years. The National Labor Relations Board by its own decisions has demonstrated that it respects neither the letter of the law nor the intent of Congress."[39]

On February 10, 1962 Member Brown took issue with Congressman Landrum's opinion of the Board's role by stating that "in my view

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[36] House Subcommittee on NLRB, 57th Cong. 1st Sess., Report on Administration of Labor-Management Relations Act by NLRB 65 (Comm. Print 1961) [hereinafter cited as Pucinski Report].

[37] 108 Cong. Rec. 6190, 6195 (1962).

[38] H.R. 8246, 88th Cong. 1st Sess. (1963).

[39] *Id.* at 6190. *Compare* Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921 (1965) (legislature must normally confine itself to declaration of generally applicable standards) *with* Fick, "Issues and Accomplishments in Administrative Regulations: Some Political Aspects," 26 Law & Contemp. Prob. 283, 287 (1961) (sometimes congressional organization unable to deal with administrative bureaucracy). *See also* McGinness, The New Frontier NLRB 237 (1963), "[T]he new Board's divided opinions provide an impressive basis for the conclusions that the Kennedy majority is undermining the purpose of the statute, frustrating the intent of Congress, and demoralizing major areas of labor-management relations." From 1954 on, Mr. McGinness was Associate Chief Counsel for Board members Beeson, Farmer and Leedom. Served as Associate General Counsel under Theophil C. Kammholz, and then received a recess appointment as General Counsel and served for several months, *supra* p. iii.

the Board is unquestionably a policy making tribunal."[40] Five days later, not unmindful of growing congressional criticism, Chairman McCulloch retorted,

> our objective, and here I speak for the whole Board, is a large one; universal acceptance by labor and by management of the policies set forth originally in the 1935 Wagner Act and contained in every amendment thereto; to substitute for industrial strife the practice and procedures of free collective bargaining, in a system which accepts individual innovation and individual rights . . . . I could perhaps wish that the provisions of the Act were so crystal clear and the cases which arise under it so stereotyped that the application of the law would be a purely mechanical operation. But this is not the situation. We are not administering an exact system of mathematics.[41]

The volume of contradictory observations about arbitration and NLRB adjudication would provide enough material for numerous articles. The quotations cited above are sufficient to illustrate the disputes. These conflicting opinions should be analyzed in terms of the institutional processes involved. Professor Cox provided a reason in an address before the Section of Labor Law of the American Bar Association. "The procedures and institutions we establish," he said, "will determine the balance between the elements of coercion and submission, on the one hand, and, on the other, of permission and consent."[42]

C. *Bases of Contradictory Observations, Variables and Method of Evaluation*

It must be assumed that the contradictory observations are empirically founded, because each person propounding his opinion has broad experience in the field. However, this does not mean that each appraisal takes into account the experience of the party whose opinions

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[40] Brown, "Member Brown Views the Labor Board as Policymaking Tribunal, Board release cited in 108 Cong. Rec. 6191 (1962). *But see* Congressman Griffin's reply to this statement, "let there be no mistake about the fundamental issue [it] . . . comes down to responsibility for determining public policy." *Ibid.*

[41] McCulloch, "The How and Why of Recent NLRB Decisions," address before the American Management Association Mid-Winter Personnel Conference at Chicago, Ill. on Feb. 15, 1962 (Press Release to P.M. Newspapers R-842). *See also* speech given same month by Judge Henry J. Friendly at Harvard Law School Holmes Lectures. "An agency that has done much to translate the general words of its charter into more specific guides for behavior by the regulated and decision by the regulators is the National Labor Relations Board." Friendly, The Federal Administrative Agencies, The Need for Better Definition of Standards 36 (1962).

[42] Cox, "The Future of Collective Bargaining," Address before Section of Labor Law of American Bar Association on Aug. 8, 1961, in 48 LRRM 28, 35.

are contradictory. The polarity of attitudes provides a key for evaluation.

1. *Polarity and Myopia*

Before attempting to formulate the bases of the assertions, it is possible to hypothesize that the polar opinions indicate that each stated position ignores the basic assumptions implicit in the conflicting opinion. For example, when Mr. Justice Douglas indicated the reasons why arbitrators were chosen, his explanation was based on the importance of expertise when brought to bear on specialized problems which lend themselves to a system of self government—"knowledge of the common law of the shop."[43] Judge Hays states that if this means the parties choose an arbitrator to obtain a "philosopher king," his experience suggests otherwise.[44] "On the contrary," he states, "most employers and unions choose arbitrators who will go strictly by the *statute law* of their relationship (i.e., the contract) and not by the so-called common law of the shop. . . ."[45] The conflicting opinions are premised on the alternative bases of "the selection process," "expertise," and "limited invasion of each party's prerogatives." On the other hand, when Judge Hays castigates a system wherein the judge is beholden to the parties who select him and calls for adopting arbitration in the courts, his concern is that this process as it now exists should not be given carte blanche approval by our judicial system.[46] He notes the problems of "award splitting,"[47] "rigged awards,"[48] and "judicial review."[49] However, his suggestion that the procedural advantages of arbitration could be readily adapted to a public system of justice[50] ignores Mr. Justice Douglas' (and Chairman McCulloch's) concern over flexibility.[51] The latter anxiety is directed to the factors of "caseload," "time lag," and "costs" in the arbitration process. This paper will examine arbitration in light of the "selection process" and the basis of concern over "expertise," "award splitting," "invasion of prerogatives," "judicial review," "caseload," and "costs."

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43 United Steelworkers v. Warrier & Gulf Nav. Co., *supra* note 6. *Compare*, "the weighing of the arbitrator's greater institutional competency, which was so vital to those decisions [Steelworkers trilogy], must be evaluated in that context." N.L.R.B. v. Acme Industrial Co., Docket No. 52, October Term, Jan. 9, 1967, United States Supreme Court.

44 Hays, *op. cit. supra* note 29, at 41.

45 *Ibid.*

46 *Id.* at 192.

47 *Id.* at 52.

48 *Id.* at 62.

49 *Id.* at 19-34.

50 See note 35 *supra* and accompanying text.

51 See notes 28 and 30 *supra* and accompanying text.

2. *The Variables*

The alternative bases underlying the dispute over the "policy-making" role of the Board are not as clear as those that underlie the disagreement in evaluating the arbitral forum. This is because of the difficulty in understanding the role of the political process—"that which made it necessary in the first place to create such a system of fuzzy standards."[52] Since the NLRB is administering standards set by Congress, "Congress itself—or at least Congressmen as individuals—is one of the constituencies of the agencies which must be satisfied."[53] This situation has led one commentator to observe that "the administrative agencies *are* politics in action."[54] Thus, one variable might be termed the "political factor." Congressman Landrum attempted to avoid such analysis and focus on the judicial aspect of the Board (unfair labor practice jurisdiction) by tracing his discontent with the Board for twenty-five years.[55] Assuming, *arguendo*, that this is not the "out party" challenging the "in party," is the disagreement simply a matter of the Board's refusal to apply the letter of the law? The co-authors of the Landrum-Griffin bill argued that they attempted to close the loopholes in the Taft-Hartley Act created by the Board, but that it had frustrated this intent as evidenced by its handling of "secondary boycotts," "hot cargo provisions," "free speech," "blackmail picketing," and "employer coercion" during a strike.[56] Were these examples of the law that spelled out in "definite terms the conduct that constitutes unfair labor practices"?[57] Even if one could accept this unlikely view, can it be seriously contended that Congress could have contemplated all the situations that might arise when the statute was drafted? Even if this were possible, the changing context of the labor field makes it impracticable, even without widespread disagreement, to draft such an all-inclusive statute.[58] Moreover, the Congressmen's allegations of injudicious behavior did not adequately consider the im-

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[52] Miller, *supra* note 27, at 78.

[53] *Id.* at 70.

[54] *Id.* at 71.

[55] *See* note 39 *supra* and accompanying text.

[56] 108 Cong. Rec. 6190-94 (1962).

[57] *Id.* at 6190.

[58] *See* Hall, "Responsibility of the President and Congress for Regulatory Policy Development," 26 Law & Contemp. Prob. 261, 275 (1961) (inconsistency in legislation reflects inconsistency in country at large); Miller, *supra* note 27 at 70 (standards are resultant parallelogram of conflicting political forces) quoting Fainsod, "Some Reflections on the Nature of the Regulatory Process in Public Policy," The Yearbook of the Graduate School of Public Administration of Harvard University 297, 298 (1940).

pact of court decisions on the Board. Congressman Landrum contended that the courts traditionally deferred to the Board;[59] but Chairman McCulloch later claimed that Board successes before the United States Supreme Court in the 1959-1961 terms were less than spectacular.[60] Although the Congressmen undeniably felt the statute which they had drafted was being misapplied, the underlying issue was the "political factor." If this dispute revolves around the traditional contest over separation of powers, that is which branch of government should make policy, then the Congressmen's attitude is myopic. To express the problem in the political scientist's focus, the fact is that when the government "... vests the underlying powers with the administrative authority it creates, [it does so] not too greatly concerned with the traditional tripartite theory of governmental organization. The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government."[61] Evaluation should be in terms of economic effects. Is the Board process, as part of the political process, helping to reach the desired ends? This paper will investigate the "political factor" in terms of Board structure, "caseload," and "time lag."

3. The Premise and Method of Evaluation to be Used

The stated purpose of this article is to investigate the preferences and prejudices of participants in labor relations and their relevance to the arbitration and NLRB processes. Even though contradictory observations have been made, there are basic issues that underlie these conflicting opinions. The premise of this article is that these underlying issues concern *process* and not specific decisions rendered, although the latter can create conflict also. Since conflicting opinions as to institutional process are subjective and highly individualistic, research in this area should be empiric and personal. The approach used in this investigation was to use the interview technique. The parties whose opinions were solicited (referred to as "participants") were arbitrators (including educators working in labor relations);[62] lawyers familiar

[59] 108 Cong. Rec. 6190 (1962) (courts defer to expertise of Board and have been reluctant to upset its decisions).

[60] During 1959-60 NLRB lost five out of six decisions in U.S. Supreme Court. In 1960-61 it won three and one-half cases out of nine. McCulloch, *op. cit. supra* note 41.

[61] Landis, The Administrative Process 11-12 (1938) cited in Hall, *supra* note 58, at 273 to indicate that the unity is caused by the industries regulated, *i.e.* their unity.

[62] The arbitrators interviewed were: Professor D.V. Brown (Massachusetts Institute of Technology) on Dec. 20, 1965; Mr. John W. Church (Regional Manager of the Ameri-

with the operation of both institutions (representing management or unions);[63] and NLRB personnel.[64] No attempt was made to achieve a valid sample, nor to statistically verify the responses as being representative. The participants[65] were selected because of their status, experience, and knowledge in the field. The objective was to analyze the attitudes of this group about the institutional processes. The method used was to interview each participant at length about his experience and opinions.[66] Questions were asked sporadically to allow narrative answers, and were phrased broadly to elicit independent critical evaluation of the basic problems in each process. The resulting information was then carefully reviewed in four steps. First, the comments were grouped into major topics and subtopics wherever possible. Second, these topics were analyzed to determine any "patterns of response." Whenever patterns developed, an attempt was made to relate them to other patterns. The purpose was to develop a critique of the processes. Third, this critique was evaluated in light of existing empirical research. Fourth, this critique was examined for possible impact on the institutions considered. The results follow.

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can Arbitration Association) on numerous occasions; Professor John T. Dunlop (Harvard University) on Oct. 30, 1965; Mr. Wm. J. Fallon (professional arbitrator) on Feb. 3, 1966; Professor James Healy (Harvard Business School) on Feb. 12, 1966; Professor Thomas Kennedy (Harvard Business School, Vice President of National Academy of Arbitrators) on Mar. 18, 1966; and Mr. Saul Wallen (professional arbitrator) on Nov. 2, 1965.

[63] Attorneys interviewed were: Mr. Arthur J. Flamm (Segal & Flamm) on Jan. 27, 1966; Mr. George Foley (Hale & Dorr) on Feb. 18, 1966; Mr. Lawrence Fordham (Foley, Hoag & Elliot) on Mar. 18, 1966; Mr. James Grady (Grant & Angoff) on Feb. 4, 1966; Mr. Sam Leiter (Gordon & Leiter) on Feb. 3, 1966; Mr. Robert D. Manning (Grant & Angoff) on Feb 4, 1966; Harold Roitman, Esq. on Mar. 18, 1966; Mr. Vernon C. Stoneman (Stoneman & Chandler) on Feb. 4, 1966; Mr. Alan A. Tepper (Schneider & Tepper) on numerous occasions; and Mr. Frank Vaas (Ropes & Gray) on Feb. 3, 1966.

[64] NLRB personnel were interviewed on numerous occasions in connection with statistical and other research done in the Boston Regional Office. They were: Mr. Edward Goodstein (Organization and Methods Division, Wash., D.C.); Mr. Art Hoban (Regional Director of Boston Office); and Mr. Harold Kowal (Assistant Regional Attorney).

[65] With the exception of Mr. Ratner (who was selected for his knowledge in the field and experience with "watchdog" Congressional Committees) and Mr. Goodstein (interviewed by phone in regard to statistical methods used and information available), the parties were selected wholly from the Boston, Massachusetts area. The prevalence of educational institutions in this area with highly qualified personnel was advantageous, but perhaps atypical; and certain evaluations may have limited application.

[66] The average interview was well over an hour, and the author is grateful for the participants' unstinting cooperation. The method of interviewing was discursive and narrative to the extent possible, since "phrasing questions" might yield limited responses that would not reflect the participants' "preferences and prejudices."

II. Evaluation of Arbitration and the NLRB by the Participants

A. *Arbitrators and the Arbitral Process*

A brief statement is necessary to indicate the type of arbitration that the following comments concern. Generally, third party roles encompass what is referred to as "arbitration."[67] For the purposes of this paper "arbitration" will indicate the situation where a third party neutral arbitrator is called in by the parties to adjudicate (as opposed to mediate) a dispute. Actually this type of arbitration is also flexible in form including: "permanent" (permanent umpires, impartial chairmen, and permanent panels)[68] and "ad hoc" arbitration; and tripartite boards[69] as well as single arbitrators. A 1964 survey indicates that 63.8 percent of the arbitrators' caseload is "ad hoc," 32.2 percent permanent umpire, and 4 percent permanent panels.[70] Arbitration when used in this paper will refer to the process, when requested by the

[67] Cole, "Discussion—Neutral Consultants in Collective Bargaining." in Collective Bargaining and the Arbitrator's Role 96 (Kahn ed. 1962) [hereinafter cited as 1962 Proceedings NAA]. *See also* Chamberlain, *supra* p. 83. *See generally* Elkouri & Elkouri, How Arbitration Works 48-77 (Rev. ed. 1960).

[68] For a discussion of the types and lingering effects of the mediator-arbitrator see Killingsworth and Wallen, "Constraint & Variety in Arbitration Systems," in 1964 Proceedings NAA 56.

[69] *See* Ahearn, "The Operation of Tripartite Agencies in Labor-Management Relation," 7 Arb. J. 210 (1957); Lesser, "Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?" 12 De Paul L. Rev. 125 (1962). For a new appraisal of the effectiveness of tripartite arbitration see Fleming, *op cit. supra* note 29, at 221-22.

[70]

Percentage Distribution of Arbitration Caseload (NAA Figures)

Year	No. of Responses*	"Ad Hoc"	Permanent (Umpire &/ or Chairmen)	Perm. Panels
1962	160	72.7%	18%	9.3%
1964	98	63.8%	32.2%	4.0%
Increase or/ Decrease	— 62	—8.9%	+14.2%**	+5.3%

* Number of responses to National Academy of Arbitrators (NAA) Survey.

** Trend from 1952-1962 down, reversed 1962-1964 period.

Figures compiled from Survey Committee, "Appendix D Survey of Arbitration in 1964" [hereinafter cited as 1964 Survey], in Proceedings of the 18th Ann. Meeting of the NAA 243-54 (Jones ed. 1965) [hereinafter cited as 1965 Proceedings NAA]; and Survey Committee, Appendix C Survey of Arbitration in 1962 [hereinafter cited as "1962 Survey"], in 1964 Proceedings NAA 292-316.

parties, whereby a single "ad hoc" arbitrator is designated unless the facts discussed are of general application or otherwise stated.

Although consensus was not a prerequisite to consideration of opinions put forth, the factors of flexibility (as indicated by the above discussion) and speed were unanimously stated as the prime advantage of the arbitration process over NLRB adjudication.[71] Insofar as possible problem areas for consideration, the responses indicated the following as susceptible to criticism; the selection process, time lag, and costs. They will be considered in detail.

1. The Selection Process: Mutuality and Expertise

An initial pattern of response from the participants was that the single most important factor in arbitration was the selection of the "right" arbitrator. For example, the comment was made that "50 percent of the battle insofar as the outcome was concerned was in the selection of the arbiter."[72] Since arbitration was called an "art form" rather than a "legal form" by one of the participants, who then is the "artist"? What is his background? How does he become recognized? And most important, why is "his work" selected?

Fortunately, statistics are available from a survey that enable a general description of the average arbitrator (at least as of 1962)[73] who turns out to be anything but "average." He is almost sixty years of age,[74] has a high school degree,[75] and seven and one-half years of college and graduate study.[76] His fields of study were probably economics in college,[77] and either economics or law in graduate school.[78] Chances

[71] *See* Jones & Smith, *supra* note 29, at 1116 (comparing arbitration to courts or pure collective bargaining).

[72] Complete anonymity was assured before the interviews, and therefore none of the participants will be directly quoted unless permission has been obtained.

[73] "1962 Survey," *supra* note 70, at 303 (figures compiled from 194 responses).

[74] A comparison of the statistics compiled by the "1962 Survey", *ibid*, taken by the NAA with those compiled by the AAA appearing in Coulson, "Spring Checkup on Labor Arbitration," 16 Lab. L.J. 259, 262 (1965) on the age of arbitrators reveals:

Percentage of Arbitrators by Age Bracket

Agency	Under 40 Yrs	40-50 Yrs.	50-60 Yrs.	Above
NAA*	4.6%	33.9%	40.8%	20.7%
AAA**	5.1%	24.7%	43.2%	26.8%

* 174 Responses

** 1400 Names on panel

[75] "1962 Survey," *supra* note 70, at 304 (average 3.9 years of high school).

[76] Only 3 out of 175 responses indicated they did not have college degree. *Id.* at 293.

[77] *Id.* at 304 (63 out of 172 responses).

[78] *Id.* at 306 (respectively 68 and 80 out of 168 responses).

are slim that he will be a professional arbitrator (less than two out of ten), but they are good that he will be an educator (more than four out of ten) or a lawyer (three out of ten).[79] His interest in arbitration, for the most part, comes from education;[80] or from War Labor Board experience.[81] It is extremely unlikely that he will have had full time work with either unions, the labor movement, companies, or employer associations.[82] The sources of his "ad hoc" arbitration in 1964 were, in order of volume, the parties, the Federal Mediation and Conciliation Service (FMCS), and the American Arbitration Association (AAA).[83] In spite of the fact that the "artist" is a talented person with a neutral background and the parties are aware of his background and skills due to the selection process, there was still a very real concern in his selection expressed by the participants (particularly by management counsel). The following questions were asked. Why was there such an expressed concern for selecting the "right" arbitrator? Why was management counsel apparently more concerned in this matter than union counsel? How does the selection process operate to accommodate this concern? What are the effects of the selection process?

(a) *The Basis of Concern*

Even though the lawyers interviewed were practically unanimous in attributing importance to the selection process, once the question "why" was broached the unanimity (and perhaps the candor) broke down. The reasons most frequently mentioned as to why it is so important to select the "right" arbiter were: (1) expertise and ability, (2) the undesirable practice of "award splitting," (3) the increasing tendency of arbitrators to invade management prerogatives, and (4) the finality of the arbiter's award (limitation of review). Other singular

79 Coulson, *supra* note 74, at 263.

80 "1962 Survey," *supra* note 70, at 306 (48% reported interest arose from education).

81 *But see* Coulson, *supra* note 74, at 262 (folklore of arbitration).

82 "1962 Survey," *supra* note 70, at 307 (93.7% had no fulltime experience with labor movement; 83.3% none with management).

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Sources of "Ad Hoc" Arbitration (Percentages)

Year	Parties	AAA	FMCS	State Agencies	Survey Responses
1952	64.7%	(Lowest)	(Lowest)	(Lowest)	(Unknown)
1962	30.0%	24.2%	4.6%	11.2%	173 Responses
1964	42.5%	19.2%	24.9%	9.7%	93 Responses

Comparison of "1964 Survey," *supra* note 70, at 251 with "1962 Survey," *supra* note 70, at 308.

responses indicated that the importance attributed had the effect of slowing down the process, and impressing clients. Before any analysis is undertaken it is important to note that the fact that some of these reasons may not fully withstand the challenge of logical appraisal does does not render them insignificant, because the irrational prejudices of the parties can motivate actions as readily as rational preferences. However, analysis of some of the major reasons given for selecting the "right" arbitrator is nonetheless necessary to understand the selection process.

(1) *Expertise and Ability*

If "expertise" refers to knowledge gained through experience in dealing with a particular industry, as opposed to general knowledge, it is relevant criteria. For example, problems dealing with "job classification" and "work assignments" require specialized "know-how." However, the participants' attitudes of preferring "old line arbitrators" (those with War Labor Board, WLB, experience) or refusing to select "new faces" cannot be supported by this example. As one participant pointed out, WLB experience could not be equated with technical expertise since it was far more limited in scope. Furthermore, it was indicated that "expertise" must be related to a given problem, and so it was ridiculous to use it as a constant when the problem was technical (such as job classification) as well as when it was non-technical (for example disciplinary cases).[84]

Ability is the "raison d'etre" for selecting an arbitrator, but it is generic in that it includes all of the reasons for selecting one man as opposed to another. One prominent pattern of response was that "ability" meant the competence to control a hearing thereby cutting delay and costs, and the skill to clarify issues and render a precise award.[85] This type of "ability" is the basis of the arbitral process. The problem becomes how is this type of ability to be determined by the selection process without personal contact? Although reading prior decisions to discover the reasoning process behind the award may indicate a basis for exclusion, it does not provide a basis for excluding an untried arbitrator or determining how the hearing was handled.

With the above stated limitations, expertise and ability must be acknowledged as valid criteria.

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[84] Job classification and work assignments comprised 10.1% of caseload while disciplinary cases accounted for 18.8% in 1964. "1964 Survey," *supra* note 70, at 247.

[85] *See generally* "Editorial—The Hazards of Dicta in Labor Arbitration," 19 Arb. J. (n.s.) 68 (1964).

(2) *Award Splitting*

This phrase, normally thought to indicate the undesirable propensity to render approximately the same number of awards for each side, may also refer to splitting the decision itself.[86] For example, it may refer to the remedy in a discharge case of directing reinstatement of an employee but without back pay on the basis that discharge is too harsh even though some discipline is warranted. On the other hand, the phrase may refer to splitting reinstatement awards half favoring management and the other half for the union. Statements made by participants that they would not try two cases involving the same parties before the same arbitrator on the same day because of splitting decisions may refer to splitting the awards. However, other comments to the effect that although splitting was not likely to occur when the case was clear but might "carry the day" on close questions could relate to either concept of "splitting." To analyze this problem it is necessary to examine a case as it appears to the parties and to the arbiter. From the standpoint of the parties, if their cause is poor they will know it and there will be no reason to split it in either sense.[87] If, however, the question is close (as most cases are) both parties will probably have gone through the rationalizing process to the extent of convincing themselves of the efficacy of their cause. In this sense one party will "lose." To split by case, therefore, does not absolve the arbiter from the fact that "one man's pleasure is his opponent's pain."[88] Moreover "ad hoc" arbitrators are rarely before the same parties within a short period of time so the pain cannot be quickly relieved. To "split the remedy" assumes that neither party, convinced of their case, will assume this a loss. All of this rests on the rather shaky premise that both the arbiter and the parties have the same view of the case. As one of the arbitrator's interviewed pointed out, there is a tremendous variation in case presentation so that what is abundantly clear to the parties may be unclear to the arbiter. Even assuming that the arbitrator is in the same "control" of the facts as the parties, other reasons for not splitting come into play. His ego as a neutral does not encourage him to play such a role. The great majority of arbitrators do not put

[86] Elkouri & Elkouri, *op. cit. supra* note 67, at 57. Collateral problem of whether "permanent" or "ad hoc" arbitrator more likely to split (considered debatable).

[87] The countervailing pressures of bringing "poor cases" in order to win on percentages are: (1) the duty of fair representation, and (2) breeding lack of confidence by pressing poor claims. The permanent arbitrator would be in a better position to recognize this. *Id.* at pp. 57-58.

[88] *See* Wallen, Arbitrators and Judges: Dispelling the Hays' Haze, Paper delivered at Twelfth Annual Institute on Labor Law sponsored by the Southwestern Legal Foundation, Oct. 29, 1965.

"all their eggs in one basket," and the luxury of having more than one client affords them independence.[89] Further, there are a substantial minority of arbiters who have other types of employment, and are also free of such pressures.[90] Despite the factors mitigating against splitting, it is not so easy to evaluate the subconscious tendency to equivocate. As one of the participants admitted, it cannot be said with assurance that all arbitrators will react alike to a situation where a man with twenty-five years seniority has been discharged. Furthermore, an arbitrator may react differently where the proof of an allegation is questionable than in a situation where the allegation itself is questionable. There may be different reactions to situations where the impact of the decision falls on one person as opposed to a number of people. Indeed, there may be subconscious tendencies to split (in either sense) even though a strong argument can be made against the probability of conscious splitting. Finally, it would be less than candid to conclude that the sample of arbitrators interviewed in the Boston area can be used to evaluate all arbiters in face of Judge Paul R. Hays' empiric evaluations.[91] The point is that if this problem is so difficult to evaluate on an intellectual basis or by interview, how can the selection process serve to clarify it?

(3) *The Alleged Invasion of "Management" Prerogatives*

The prolixity of articles written on this subject is probably explained by the various meanings attached to the phrase "management prerogative."[92] There is little pragmatic value to be obtained from another decision on the merits as to which theory is right. Several responses indicated that this entire problem merely reflects subjective attitudes toward the status quo. Thus, "invasion of prerogatives" is a phrase

89 *Ibid.*

90 As of 1962 only 33.4% of the arbitrators' time was spent in arbitration. "1962 Survey," *supra* note 70, at 310.

91 "In [Judge Hays'] opinion no decision of arbitration which does not consider the affect of the arbitrator's decision on the good will of the parties is completely honest." Hays, Labor Arbitration a Dissenting View 113 (Yale 1966).

92 As examples of some of the contradictory ideas in this area, *compare* Cox, "Reflections Upon Labor Law," 72 Harv. L. Rev. 1482, 1499 (1959) (filing in interstices of agreement) *with* Burstein, "Labor Arbitration—A Management View," N.Y.U. 10th Ann. Conference on Lab. 297, 298 (BNA 1961) (filling in interstices is legislative act). *Compare* Seward, "Reexamining Traditional Concepts," in 1964 Proceedings NAA 240, 244 (implied obligations dried-up, useless argument) *with* O'Connell, "Should the Scope of Arbitration Be Restricted," in 1965 Proceedings NAA 102, 109 (muddy thinking rather than invalidity in re implied obligations). *See generally* Wallen, "The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions," in 1962 Proceedings NAA 117.

used to denote an intrusion on one party's subjective view of his rights as opposed to his opponent's rights. One participant explained that the gamut of emotions runs from the feeling that the existence of a union infringes on management prerogatives to righteous indignation against an arbitrator's decision that is in direct contradiction to an express provision in a collective bargaining agreement. The incidence of the former attitude is greater, he suggested, than the occurrence of the latter type of decision.

The responses all indicated that an invasion of the status quo, as viewed from either management or the union's vantage, necessitates the selection process. For example, management counsel would use the selection process to pick an arbitrator, acceptable to the other party, whose past decisions were rational and as close to the desired result as possible.[93] The selection process thus enables the other side to balance out this effort. The pattern of responses indicates that neither side would accept "ad hoc" arbitration as readily as they do now without this process.

(4) *Judicial Review*

The fact that the arbitrators' decisions have been accorded considerable finality by judicial determination[94] evoked criticism from the participants. The comments can be divided roughly into two main categories. One type went to the role of the arbitral process in the administration of justice. This can be illustrated by Judge Hays' discussion of "rigged awards," an award which is the product of an agreement between an employer and a union, in his book. He states that "rigged awards are a shocking distortion of the administration of justice," and should not be condoned by the courts.[95] The implications of limited review of arbitration on the judicial process have been discussed elsewhere,[96] and need not be considered here. However, the other

[93] Query: what does the sentence (in the Code of Ethics for Arbitration), "a party should not seek to obtain the appointment of an arbitrator in the belief that he will favor that party and thereby give him an advantage over his adversary," mean? American Arbitration Association & National Academy of Arbitrators, Code of Ethics and Procedural Standards for Labor-Management Arbitration 8, § 3 (AAA-10M-3-57).

[94] "An order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause it not susceptible of such an interpretation." United Steelworkers v. Warrier & Gulf Nav. Co., *supra* note 6, at 582. "He [the arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." United Steelworkers v. Enterprise Wheel & Car Corporation, 363 U.S. 593, 597 (1960).

[95] Hays, *op. cit. supra* note 91, at 62-66.

[96] For discussions of procedural arbitrability see Dunau, "Procedural Arbitrability—A Question for Court or Arbitrator," 14 Lab. L.J. 1010 (1963); Note, "Procedural

category of comment by the participants concerned the impact of limited review on the selection process, and is relevant. This consideration involves the relationship of finality of awards vis-a-vis the arbitrators' power to affect the balance of power between management and a union. For example, one theory advocates "finality" because of speed and recourse against a poor decision at collective bargaining sessions. As one participant stated, those who advocate this resolution simply do not understand the difference between "selling a concession" and buying it back." The point being that once a remedy is confined to the bargaining table, a shift in the balance of power has occurred. Where the issue determined by arbitration has been contested in collective bargaining negotiations and is of considerable importance to the parties, recourse from the decision to the collective bargaining table is "after the fact." Moreover, the standard of judicial review set forth by the United States Supreme Court in the *Enterprise Wheel* case,[97] namely that the award is legitimate if it draws its essence from the collective bargaining agreement, does not provide a safety valve.[98] If the standard is applied literally, it indicates a limited chance for review.[99] Conversely, the standard undermines the feasibility of limiting the grounds for determination by contract because of the vagueness of the phrase "draws its essence from the collective bargaining agreement."[100] The

Arbitrability: A Question for the Supreme Court," 15 Syracuse L. Rev. 553 (1964); Note, "Procedural Arbitrability Under Section 301 of the Labor Management Relations Act," 73 Yale L.J. 1459 (1964). See Jones & Smith, "Report with Comments," 62 Mich. L. Rev. 1115 n.2 (1964) for other articles dealing with procedural and substantive arbitrability. For general discussion of judicial review of arbitration see Hays, *op. cit. supra* note 91; Symposium—"Arbitration and the Courts," 58 N.W.U.L. Rev. 466 (1963). *Cf.* Cornfield, "Developing Standards for Determining Arbitrability," 14 Lab. L.J. 564 (1964); Stone, "Voluntary Impartial Review of Labor: Some Reflections," 58 Mich. L. Rev. 55 (1959). Compare Jaffe, Judicial Control of Administrative Action 295-304 (1965) (two-stage order of NLRB).

[97] United Steelworkers v. Enterprise Wheel & Car Corporation, *supra* note 94.

[98] United Steelworkers v. Enterprise Wheel & Car Corporation, *id.* at 594. *Cf.* "[T]he interrelationship between arbitrators, the courts, and the NLRB are somewhat amorphous and not susceptible to precise delineation, and the law of the trilogy may have the possible effect of blurring still further the shadowy demarcation lines that presently exist." Aaron, "Arbitration in the Federal Courts: Aftermath of the Trilogy," 9 U.C.L.A. L. Rev. 360, 377 (1962).

[99] *But see* Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677, 679-80 (1966) (question of authority of arbitrator under collective bargaining agreement is subject to judicial review).

[100] This phrase has not been defined by the United States Supreme Court. Compare § 10(e) "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of any agency action. . . ." Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1009(e) (1958).

impact, therefore, is to confine preventative measures to selecting an arbitrator who is not likely to shift the balance of power. This desire is not without merit, but whether the selection process can accommodate this goal is another question. The participants indicated that this standard of review has an impact on the selection process.[101]

In summary the reasons given for the significance of the selection process cannot be summarily disposed of as being entirely without merit. Expertise and ability are important when applied to specific problems and the handling of the dispute itself. "Award splitting" must be analyzed so that hard feelings over losing a close case can be distinguished from intentional splitting. However, with today's minimal knowledge of psychology it cannot be said that subconscious predilections which tend toward splitting do not exist. All that can be said is that it is doubtful that intentional splitting exists. Whether the selection process can reveal splitting is another question. While it is too late in the game to yield to the notion that it is a management prerogative not to accept unions, management and unions have excercised their prerogative to select an arbitrator who will respect their own notions of the status quo. Finally, regardless of the consideration of the propriety of judicial review of arbitration in the legal process, the standard of review is an existing factor in the selection process. The reasons given for concern with the selection process are both objective and subjective. The need to select the "right" arbitrator may be overstated, but it is justified as difficult problems arise. Further, the process has merit to cull observably bad performances. Subjectively the selection process provides the basis of mutuality necessary for the parties to abide the "interference." Moreover, selection, flexibility, and speed make arbitration a desirable, as well as palatable, substitute for work stoppages and litigation.

As to the additional comments relating to the "advantage of delay" and the use of the selection process to "impress clients," the former will be considered in relation to the time lag in arbitration, and the latter will be treated with the subtle question of why management counsel were apparently more concerned with the selection process than union counsel.

(b) *The Distinction Between the Management Lawyer's and the Union Lawyer's Approach to the Selection Process*

The unanimity of response indicating that management lawyers considered the selection process as the single most important factor

101 "[The subject of judicial review] . . . seems to be a matter of genuine understandable concern to many who basically believe in arbitration." Jones & Smith, *supra* note 96, at 1126-27.

warrants prima facie acceptance. Management counsel documented this claim by the devices they used to screen arbitrators. Some stated that they kept an up-to-date file of arbiters comprised of past decisions, hearsay, rumor, tips, and where possible their own experiences with them. Others advised they used a service which is available evaluating all experienced candidates.[102] One participant stated that on submission of a list, he read over the reported decisions of the included arbitrators preferably dealing with the same issue or, if not available, analogous problems. Several lawyers representing management admitted that their clients had their own ideas. On the other hand, lawyers who represent unions claimed that most of the arbitrators suggested by the appointive agencies were qualified, and seemed to place little importance on a formal study of them. The significance of these opinions is to indicate that there is an apparent difference between management and union counsel regarding the importance to be placed on the selection of an arbitrator. This distinction in attitudes has been noted elsewhere.[103] Yet, it would appear that if the concern for selection is valid it should apply with equal force to either side.[104]

The participants indicated that management lawyers spend more time researching the background of arbitrators than do union lawyers. This assumption might be warranted on the findings of a recent survey that indicates that lawyers fees charged management in arbitration cases are substantially higher, on the average, than those charged unions.[105] To assume, however, that this difference is due to time spent evaluating arbitrators would be pure conjecture. The time spent in research in itself does not prove a difference in union concern over selection because the variation could be equally explained by a difference in approach to arbitration.[106] Further, assuming each side

[102] What Mr. Saul Wallen referred to as a "private FBI" is at least two types of services. Wallen, *op. cit. supra* note 88. One type of reporting service will send out a dossier on arbitrators. Another type of operation works on a retainer to evaluate panels sent out by the appointive agencies.

[103] *E.g.*, comment about acceptance of trainee arbitrators, *i.e.*, "reaction [management reluctance to accept] is believed to be representative of a reaction that may well exist in other areas of the country." Committee on Training New Arbitrators, "Appendix D Report to Membership *1964*," in 1964. Proceeding NAA 324. *See also* Fleming, The Labor Arbitration Process 209-11 (Ill. 1965).

[104] *Compare* Fleming, *id.* at 35, ". . . it must be recognized that the mechanics of the grievance procedure give companies and unions a somewhat different perspective toward arbitration." Query, is this difference reflected in the selection of an arbitrator?

[105] *Id.* at 46. "[O]ne-third of the union lawyers charge less than $200 for the average case. The average total fee for the union lawyers is $315. Although the average company lawyer earns more than $700 in total fees from an average one-day hearing, there is no great uniformity in charges."

[106] *See* Fleming, *id.* at 35.

views the process similarly, union structure is such that in many cases other more economical and efficient methods of selecting an arbitrator may be available. For example, information could be gathered by arbitrators on a national rather than a local scale thereby spreading the costs.[107] However, informal methods of obtaining information are also available to union lawyers.[108] Probably, union business is concentrated in fewer law firms than management business. Therefore, what management counsel accomplish by individual and more time consuming work my be accomplished on a less formal basis by union counsel. These less formal methods could logically be translated into expressions of less concern, but the unions would still be protected insofar as the selection process is concerned by the cohesive nature of their structure and relationship with the lawyers who represent them.

This assumption of a difference in approach to selection, and the arbitration process itself, is born out by historical and other operational factors. First, management's acceptance of the arbitral process represents "an adjustment by management to the unions' point of view."[109] The historicity indicates that management mistrusted the process while unions' recent acceptance has not been begrudging. Reluctance to engage in an activity carries with it a commensurate care in the exercise of its use. This caution tends to explain management's care in selection. Conversely, the union's nonchalance may be explained by the "politics" of arbitration. It may be less burdensome to have an arbitrator say "no" than having a union officer say "no" to a member.[110] Thus, the process may be used by the union to pass off an undesirable decision to the arbiter. Even though Professor R. W. Fleming indicates that a favorable decision may be of greater import to the union than to the company because this will usually signify a change in the status quo,[111] the countervailing arguments are more persuasive. A company will be unwilling to live with an adverse decision which deals with a sensitive area.[112] As indicated previously, a change in the status quo may affect the balance of power.[113] Further,

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107 *Id.* at 210. "Some international unions give advice to locals on the choice of arbitrators, and on the management side manufacturers' associations, chambers of commerce, and private organizations often furnish information about arbitrators."

108 *Ibid.*

109 Management reluctant to arbitrate because it meant giving union status. Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management 745 (Brookings Inst. 1960).

110 *See* Fleming, *op. cit. supra* note 103, at 35.

111 *Ibid.*

112 *Ibid.*

113 Text at pp. 29-30 *supra.*

use of the arbitration process is quite recent. Prior to 1930 there were only a few voluntary agreements[114] indicating that management's adjustment has been recent. Management reluctance and the newness of the process mitigate against attributing a greater concern to unions. Second, arbitration grew up as a private system and information about the process was gathered independently. It was not until 1946 that the first arbitration reports were published.[115] In addition to this fact, management has traditionally been reluctant to engage in employer associations where an exchange of information might have taken place.[116] The picture until quite recently has been one of a sharp growth of arbitration developing as a private system wherein the details of the operation were not freely exchanged. In this process, however, there has been a consistent contact by management with their lawyers. As a matter of fact, management's use of counsel has been far greater than that of unions.[117] The complete filing system of arbitrators, described by some of the participants, may well have been initiated by the private nature of the process. Unions, on the other hand, have been more centralized and not as adverse to exchanging information. One can logically conclude, therefore, that the approach to the process has been different on the management side, and that lawyers representing them would evolve a different system because of this.[118]

Once having shown that such a difference in approach to the process does exist, it remains to be demonstrated that this distinction does not indicate a lesser concern on the part of unions toward the

[114] Slichter, Healy & Livernash, *op. cit. supra* note 109, at 742.

[115] "[T]he Bureau of National Affairs published its first volume of Labor Arbitration Reports (1946) designed as a 'systematic attempt . . . to collect and classify awards handed down by arbitrators.'" *Id.* at 747.

[116] Even opposition to the Wagner Act by employer associations did not enlist wholehearted support. Millis & Brown, From the Wagner Act to Taft-Hartley 281-96 (1950).

[117]

Representation by Lawyers in Arbitration (FMCS Files)

Status of Rep.	1951-1952	1956-1957	1962-1963
No Counsel	21%	34%	40%
Both Had Counsel	31%	22%	32%
Only Company	36%	37%	25%
Only Union	12%	7%	3%
Total Cases-Company Represented	67%	59%	57%
Total Cases-Union Represented	43%	29%	35%

Fleming, "The Labor Arbitration Process: 1943-1963," 52 Ky. L.J. 817, 823 (1964).

[118] *Compare* Fleming, *op. cit. supra* note 103, at 78-106 for his theory of the effect of "predictability in arbitration."

selection process even though the role of the lawyer in the process may be less formal and his statements indicate less concern. It has been stated that one arbitrator may bring to bear greater expertise in a specific problem than another, and at the same time may engender greater confidence in the selecting parties. It follows, therefore, that selection of the "right" arbitrator is significant to both parties and does influence the process. One would have to demonstrate that unions have less concern with the process of arbitration itself to indicate less concern with the selection of an arbiter. It is impossible to demonstrate that unions have less concern with the process. Although the impact of the McClellan Committee hearings and the resultant Landrum-Griffin amendments on the grievance procedure cannot be measured,[119] there are undoubtedly pressures on unions which may cause them to present more grievances, including some approached indifferently, than they would previously have brought.[120] This does not indicate total indifference to all cases. Nor does the fact that variable patterns exist in the manner unions handle grievances prove indifference. As one participant observed, unions react as quickly to "interferences" as management does. Moreover, the volatile nature of unions, as one observer remarked, and frequent elections may either produce new leadership which feels a mandate to process more grievances to arbitration; or, in the opposite situation, create a stable mature leadership that is forced for campaign or political reasons to present cases which they might under certain conditions resolve by direct decisions.[121] Finally, Professor Fleming's statement that "if the union should be successful in the arbitration it may have gained a substantial advantage, while if it loses it will be no worse off than it was before"[122] is relevant. As a matter of observation, the assumption that unions are less concerned will not stand. Since it is pragmatically

[119] *See* Cox & Bok, Labor Law Cases and Materials 915, 916 (6th ed. 1965). For historical background see McAdams, Power and Politics in Organized Labor (1964); Publishers Editorial Staff, The McClellan Committee Hearings (BNA 1957). For the collateral problem of individual rights in the arbitration process, *compare* Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956) *with* Summers, "Individual Rights in Collective Agreements and Arbitration," 37 N.Y.U.L. Rev. 362 (1962). See generally Williams, "Intervention: Rights and Policies," in 1963 Proceedings NAA 266 (citations therein).

[120] *See* Previant, "A Union Commentary on the Impact on Collective Bargaining of Titles I through IV of the Landrum-Griffin Act," N.Y.U. 16th Ann. Conference on Lab. 157, 166-68 (1963).

[121] *See* Murphy, "Panel Discussion on Arbitration," in N.Y.U. 17th Ann. Conference on Lab. 437, 439 (BNA 1964). *See also* Slichter, Healy, & Livernash, *op. cit. supra* note 109, at 692-806 (noting variable patterns).

[122] Fleming, *op. cit. supra* note 103, at 35.

impossible to demonstrate lack of concern on the part of unions, the apparent difference in attitudes must necessarily be attributed to a difference in approach.

2. The Operation and Impact of the Selection Process

The primary objective of this investigation is to determine the preferences of the participants and their effects. Therefore, a brief discussion of how the attitudes discussed above affect the formal selection process is relevant. The formal process of selection and the duties of the appointive agencies have been presented by other materials and will not be reiterated here except to examine the impact of the pressures and methods used by the parties.[123]

The first step in the selection process of the American Arbitration Association (AAA) illustrates the factors that bear on the agency's suggestions of arbitrators to the parties. In this step, on receiving the demand for arbitration or a submission agreement, a staff member of the regional office (under the regional manager's direction) acknowledges receipt, and sends each party a copy of a specially prepared list of proposed arbitrators limited only by the proviso that "he is to be guided by the statement of the nature of the dispute."[124] Under this step the appointive agency formally controls the selection process unless the parties provide otherwise in their agreement.[125] However, three factors, other than the express proviso, have bearing on the decision. First, the regional manager must consider the availability of the arbitrators. At present it is sufficient to note that three of the arbitrators interviewed admitted being "booked up" from two to four months past the time of their interview, and also admitted having taken cases further in advance than that period of time. Others stated that they simply removed their names from the lists when they were "booked" too far in advance, or where necessary to comply with their other responsibilities.[126] The pressures of bookings necessarily affect the agency's listings. Second, the Regional Manager, or his agent, must also weigh the desirability of submitting "newly approved" or pre-

123 *E.g.*, AAA, Labor Arbitration Procedures and Techniques (AAA-29-10M-5-66); Jones & Smith, *supra* note 96, at 1132-40. (FMCS procedures). Note together the AAA & FMCS comprised 44.1% of the sources of "ad hoc" arbitration in 1964. Including selection by the parties the figure equals 86.6%. "1964 Survey," 1965 Proceedings NAA 251-52.

124 AAA, *id.* at 12.

125 "In their agreement to arbitrate, parties may provide for any method of selecting an arbitrator." *Ibid.*

126 *E.g.*, In 1962 42.1% of the professional time of arbitrators was spent in education. "1962 Survey," 1964 Proceedings NAA 310.

viously unselected arbiters to the parties in an attempt to distribute the work and give experience to "new people."[127] This consideration goes to the problem of encouraging "acceptability" which is thrust upon the appointive agency. Third, the existence of previous patterns of selection by the parties is well known to the Regional Manager either because of prior "cross outs" on submitted lists or through conversation with the parties. Thus the selection pattern of the parties themselves influences the submission of names in the first step.

Despite the importance attributed to the selection process, the important question as to its affect on arbitration still remains. The responses of the participants indicate the impact may be significant and detrimental. Some explained that the pressures had resulted in an insistence on a handful of arbitrators and a concomitant resistance to new faces.[128] The combination of the past growth of the process and the current pressures to push grievances to the arbitration stage,[129] one participant said, made it essential to introduce new people into arbitration and force their acceptability. Another summed up the underlying tone of the participants when he stated that the figures bandied about in regard to the speed of arbitration were a "myth," because they did not take into consideration the delay caused in selecting the arbitrator.

3. The Caseload and Time Lag

Reference to the startling increase in arbitration is substantiated by the fact that over the past ten years the incidence has increased on the average of 10 percent per year.[130] If the figures cited as the "sources

[127] During 1961-1963, FMCS added 168 new names to its roster (120 having little or no experience). Jones & Smith, *supra* note 96, at 1134 n.24. The AAA indicated younger men (5.1% under 40 yrs. of age) showed constant attempt to replenish. Coulson, "Spring Checkup on Labor Arbitration," 16 Lab. L.J. 259, 262 (1965).

[128] Of the 168 new names added to FMCS roster (1961-1963), 4097 panels (suggested lists) sent out included one or more such names, and resulted in a total of 271 selections. Jones & Smith, *ibid.* A collateral problem involves the standards imposed on arbitrators, see Fuller, "Collective Bargaining and the Arbitrator," 1963 Wis. L. Rev. 3 (1963) (higher than a judge). It is noteworthy that in Boston area there are only two professional arbitrators, *i.e.* Mr. Wm. Fallon and Mr. Saul Wallen.

[129] *See* Previant, *supra* note 120, at 168 (one multi-state agreement showed a two and one-quarter increase since Landrum-Griffin).

[130]

Increase in Arbitration Cases by Agency

Year	FMCS	AAA
1948	647 Cases	1,330 Cases
1963	2,757 Cases	4,074 Cases
Increases	+2,110 Cases (+311%)	+2,744 Cases (+206%)

of arbitration" by the National Academy of Arbitrators (NAA) are correct, over 17,000 "ad hoc" arbitrations can be estimated to have been held in 1964,[131] and "it has been ascertained that impartial chairmen and permanent umpires have many more cases each year."[132] To round out the statistical figures, it is significant to observe that of the 1,400 names available for listing by the sixteen AAA regional offices in 1964, only 370 rendered one or more AAA labor arbitration awards.[133] During the three year period of 1959-61, 124 AAA arbitrators received their initial appointments.[134] Of the 120 persons added to FMCS panels from 1961-1963, with little or no previous experience, 33 acquired varying degrees of acceptability.[135] Thus, the situation is one of rapidly increasing arbitration with less than rapid acceptance of new people.

The basic economics of supply and demand justifies empirical research to determine the time lag resulting from these factors. There have been attempts to statistically analyze this problem.[136] Unfortunately, as Professor Fleming stated in his most recent study, ". . . the existing surveys are not entirely additive."[137] The evidence available does not appear to support the theory that the acknowledged increase in time lag[138] in the arbitration process is due to the selection process.[139]

Figures compiled from "Panel Discussion on Arbitration," *supra* note 121, at 438. *See also* Straus, "Charges Against and Challenges for Professional Arbitration," in 1964 Proceedings NAA 214, 216 (increase of 45% in caseload 1958-1963). The reasons stated were: (1) increase in collective bargaining agreements and arbitration clauses; (2) long term contracts; (3) unions pressing more grievances to avoid §°301 suits; (4) mechanical innovations and automated equipment; (5) unemployment causing unions to fight for jobs; (6) centralization of industrial relations within companies; and (7) volatile nature of unions with frequent elections. "Panel Discussion on Arbitration," *supra* at 439. *See generally* Fleming, *op. cit. supra* note 103, Ch. 1.

131 In 1964, the FMCS and AAA were noted to account for 44.1% of "ad hoc" arbitrations, which by 1964 should have reached 7,514 between these two agencies. See "1964 Survey," *supra* note 123 at 251, and figures in note 130 *supra.*

132 "Penal Discussion on Arbitration," *supra* note 121, at 438.

133 Coulson, *supra* note 127, at 262.

134 Jones & Smith, *supra* note 96, at 1133-34 n.22.

135 *Id.* at 1134 n.24.

136 *E.g.*, Fleming, *op. cit. supra* note 103, at 58-59; Ross, "The Well Aged Arbitration Case," 11 Ind. & Lab. Rel. Rev. 262, 264 (1965); AAA Research Report, "Procedural and Substantive Aspects of Labor-Management Arbitration" 12 ARB. J. (n.s.) 67, 77 (1957).

137 Fleming, *id.* at 58.

138 Ross, *supra* note 136, at 262. "The labor arbitration process, at least, has become much more time-consuming during the past decade."

139 Fleming, *op. cit. supra* note 103, at 58, chart 2. Overall time lag from 1945-1946 to 1963 increased 89% while average lapse of time from grievance to hearing during same period increased only 67%.

However, a sound argument can be advanced supporting this hypothesis. Admitting that even where the figures used are comparable they can be used to support contradictory observations, the following evidence should be considered.

COMPARATIVE TIME LAG IN THE SELECTION PROCESS[140]

Time Consumed	1954 AAA (1183 cases) Percentage of cases completed—Grievance to Decision	1964 NAA (2739 cases) Percentage of cases completed—Grievance to Hearing
Less than 2 months	23.6%	—
Less than 3 months	55.3%	42.9%
Less than 4 months	73.6%	—
Less than 6 months	—	71.7%

First, with the caveat that these two sets of statistics are selected from two different sources and are statistically incomparable, some broad observations may be made. Professor Ross, in a 1957 report, stated that his survey showed an increase in time lag between demand or submission and hearing.[141] Professor Fleming acknowledged the same trend in his recent book.[142] There are indications that this increase is more pronounced in areas other than discharge.[143] The figures charted above demonstrate that although 73.6 percent of cases were *decided* in 1954 within 4 months from date of submission, in 1964 only 71.7 percent went to *hearing* in less than 6 months. Professor Fleming's comparision, although using two different sources also, translates this into days. His statistics indicate that the average lapse of time from *demand to decision* in 1954 was 97.5 days, while in 1963 the average lapse of time from *demand to hearing* was 81 days.[144] Taken together the two sets of figures tend to prove an increase in time lag from *demand to hearing*. Note, there was a decrease of 12.4

[140] Figures were compiled as follows: AAA Research Report, *supra* note 163, at 77, table 13 was compared with "1964 Survey," *supra* note 123 at 253. The following variables should be noted: (1) 1954 figures were compiled by AAA; (2) the 1964 figures were compiled by NAA; (3) bases are not comparable and (4) there is no way of validating samples. Compare Fleming, *op. cit. supra* note 103, at pp. 58-59 which supports hypothesis using the same as well as different samples.

[141] Ross, *supra* note 136, at 264-65 (he indicates 11.5% in 10 year period).

[142] Fleming, *op cit. supra* note 103, at 58, chart 2. Average lapse of time from grievance to hearing increased 11.8 days from 1945-46 period to 1955-56 period; and 55.3 days from 1955-1956 period to 1963.

[143] Ross, *supra* note 136, at 264 (*e.g.*, wage rate, job classification, and fringe benefits).

[144] Fleming, *op. cit. supra* note 103, at 58-59. *Compare* Chart 2 *with* Chart 3.

percent in cases *heard* within 3 months as compared to those *decided* in the same time 10 years before. However these two sets of figures alone would hardly prove the hypothesis.

Second, Professor Fleming states that figures drawn from 250 FMCS cases indicate that the average time lapse from grievance to hearing in 1963 was 167 days.[145] This period breaks down as follows: 86 days from grievance to demand; 30 days from demand to appointment; and 51 days from appointment to hearing.[146] He concludes that "it is impossible to know how much of this time is attributable to the parties and how much is due to the difficulty in finding an open date on the arbitrator's calendar."[147] This begs the issue of how the arbitrator's calendar is affected by the selection process.[148] According to the participants interviewed, limited availability is largely due to the parties. It is the selection process itself which narrows availability, because the nub of the process is to focus on acceptable arbiters. It follows that a process which is designed to limit "acceptable supply" in face of increasing demand will create time lag pressures.

Third, there is some doubt in regard to the average lapse of time from *hearing to decision.* Professor Fleming compares Ross' 1945-1946 figures, derived from *Labor Arbitration Reports,*[149] with 1963 figures drawn from the Federal Mediation and Conciliation Service.[150] This comparison supports the conclusion that the average lapse of time from *grievance* to hearing was longer than the average lapse of time from *hearing to decision,*[151] and this indicates the impact of the selection process on time lag in arbitration. However, the comparision shows that the increase in the time lag from *hearing to decision* has increased more than the time lag from *grievance to hearing* percentage-wise.[152] The latter tends to show that the overall increase of time lag in arbitration is caused primarily by the decision making process. There are two problems with this conclusion. In the first place, it should be noted that, according to Professor Fleming's comparisons, the average number of days in the *pre-hearing* time lag increased 67.1 during the ten year period[153] On the other hand, the *post-hearing* time lag increased only 45.2 days during the same period.[154] The *pre-hearing* increase in time

145 *Id.* at 58, chart 2.

146 *Id.* at 59, chart 3.

147 *Id.* at 61.

148 Compare Fleming's concept of predictability. *Id.* at 78-106.

149 Ross, *supra* note 136, at 263.

150 Fleming, *op. cit. supra* note 103, at 58 n.4.

151 *Compare* Chart 2 *with* Chart 3, *id.* at 58-59.

152 Figures compiled from charts. *Ibid.*

153 *Ibid.*

154 *Ibid.*

lag is more significant. Second, if one interpolates figures from other sources, the results do not justify the same conclusion. For example, comparing the NAA 1964 survey of *post-hearing* time lag with Ross' 1945-1946 figures tends to indicate little increase in time lag. According to the NAA survey 58.2 percent of the cases were decided within 16-30 days.[155] This is not inconsistent with the 27.8 day time lag from hearing to decision shown by the Ross study.[156] This by no means proves that Professor Fleming's conclusions are unfounded, but may indicate that the figures supplied by different agencies are incomparable. The very least that can be said of *post-hearing* time lag is that further empirical study is warranted.

The argument that the selection process does influence time lag in arbitration proceeds as follows: (1) the empirical evidence indicates that the length of time necessary to get to the hearing stage from demand has increased significantly; (2) the selection process has a double-edged impact on time lag in that the parties can delay selection and limit acceptability; and (3) the impact of the decision making process (post-hearing) is subject to doubt.[157] This line of reasoning is reinforced by the factors of growing caseload and stubborn resistance to accepting new people as arbiters.

4. The Cost Factor

One of the participants contrasted this factor with an underlying policy of the Wagner Act. When the Act was passed one of the concomitant advantages was to provide unions with a free forum to press their charges. Due to concurrent policies favoring arbitration and providing for court litigation, he said, the significance of this free forum has been muted. Even though, he continued, this may not affect national unions adversely, it is causing a financial squeeze on small locals who do not receive funds for arbitration from their national organization. The

[155] "1964 Survey," *supra* note 123, at 253.

[156] Ross, *supra* note 136, at 264.

[157] The short period from 1962-64 does indicate stability.

Percentage of Decisions Rendered from Appointment

Time	1962 (Cumulative)	1964 (Cumulative)
1-15 Days	—	—
16-30 Days	74.8%	74.6%
31-60 Days	90.7%	92.3%
61-90 Days	95.0%	95.7%
Over 90	100.0%	100.0%

Figures compiled from "1964 Survey," supra note 123, at 253-54 and "1962 Survey," *supra* note 126, at 316.

same may be said for small businesses by analogy. If the pressure to grievances to the arbitration stage continues and if the NLRB and courts continue to defer to arbitration, a substantial financial problem may arise. Several arbitrators indicated that their fees were being paid off in installments because they could not afford to pay them in a lump sum.

How much does arbitration cost? A recent book appraising per diem fees of arbitrators indicates that the percentage increase in the average per diem fees is almost the same as the percentage rise in the average hourly wages of production workers in manufacturing.[158] However, the author is quick to note other factors influencing the cost to the parties, e.g. (1) counsel fees, (2) court reporter's fee, (3) time spent in preparation of the grievance by both parties, (4) pay for lost time while attending hearings, (5) charges for hotel conference rooms, (6) service agency fees,[159] (7) back pay awards, and (8) travel expenses for the arbiter, counsel, and court reporter.[160] Professor Fleming's figures based solely on the arbitrator, lawyers, and court reporter's fee for a one day hearing show a cost of 640 dollars to the union, and 1,025 dollars to the company.[161] Even a cursory examination of the cost factors cited above justifies the conclusion that this estimate of costs is inadequate. Moreover, Professor Fleming's figures indicate that the average length of a hearing is 1.15 days, and the costs presented are subject to multiplication.[162]

Some cost savings can be achieved by the arbitrator himself, such as knowledge of the problem (also one of the criteria in the selection process),[163] avoidance of "obiter dicta,"[164] and a sliding fee scale based on experience.[165] An unduly broad opinion may result in a backlash problem that will necessitate further expenses to the parties in "unsolving" what was solved, not to mention the resultant exacerbation of feelings. However, most of the possible cost savings can be accomplished by the parties themselves, such as: not requiring a written opinion, not ordering needless transcripts, checking into the arbitrator's

158 Fleming, The Labor Arbitration Process 38 (Ill. 1965).

159 Administrative expense includes fees paid to appointive agency, and sometimes includes additional expense for subsequent hearings. AAA *op. cit. supra* note 123, at 22.

160 Fleming, *op. cit. supra* note 158, at 50.

161 *Ibid.*

162 *Id.* at 40. FMCS tabulations for all cases in 1962 indicates discharge hearing is comparable in length to all cases according to Professor R. W. Fleming.

163 AAA, 9 Ways to Cut Arbitration Costs (McGraw & Hill 1959).

164 "Editorial—The Hazards of Dicta in Labor Arbitration," 19 Arb. J. (n.s.) 68 (1964).

165 Fleming, *op. cit. supra* note 158, at 53.

per diem charge in advance, using state agencies where they are effective, stipulating as many facts as possible before the hearing starts, avoiding indiscriminate citations, avoiding futile fights about arbitrability, avoiding unnecessary postponements and cancellations, better preparation of cases, and watching "back pay" matters.[166] The parties control the overall cost factor to an appreciable degree as the above propositions indicate. However, the effect of the cost on arbitration process cannot be minimized.

5. Summary

A recapitulation of the participants' evaluation of the "ad hoc" arbitral process indicates that they believe it to be desirable because of the objective factors of flexibility and speed, and the subjective aspect of the opportunity to control their own affairs. Control over the process itself (as opposed to the substance of the dispute) stems from the selection process. Both unions and management, and their lawyers to varying degrees, are concerned with the selection process even though they may approach it in different ways. However, this concern evidenced by the selection of an arbitrator has had a profound affect on the time lag in the last ten years. This impact has been intensified by a dramatic increase in the caseload and a continued resistance to new arbiters. In addition to this spiraling effect of "control," the cost factor (although not precisely delineated by empirical study) may also be attributed as a problem to the parties. The rising cost of the process multiplied by an ever-increasing caseload may pose difficulties for small businesses and small unions alike. The participants acknowledged that the process it not without its inherent problems, and use of the process should not ignore these difficulties.

B. *The National Labor Relations Board*

Since the approach taken to the problem of the interrelationship of arbitration and NLRB adjudication is to analyze the institutional processes of each, this study is not truly comparative. However, some comparison is inevitable. Where comparison exists it derives from the form of the study rather than any concept that the two forums are interchangeable. As one participant indicated the two forums are not comparable because they are not alternative. Nonetheless, he went on to comment that arbitration grows out of an existing relationship, is more expeditious, less inflammatory, and presents a better chance of

[166] *See* Colin, "One Way to Reduce the Cost of Arbitration," 10 Lab. L.J. 611 (1959) (pre-trial stipulation procedure); Editorial, "Controlling Costs in Arbitration," 14 Arb. J. 1, 28 (1959) (small claims arbitration).

receiving justice since its rules are more flexible than the Board's. He also indicated that the Board does not understand the problems that arise out of going relationships. There were other comments to the effect that the NLRB was overburdened and prone to shifting political commitments that were improper for a quasi-judicial body. One participant stated that after thirty years the Board had still failed to resolve the basic issues that confronted it at the beginning, and that some of these problems should have been resolved in this period of time. The major recurring comments centered around three complaints: (1) a charge that the Board was "too political," (2) a complaint that the NLRB's operation was rigid, and (3) allegations of intolerable delay. Each accusation warrants consideration.

1. The "Political Factor"

Even though evaluation of the NLRB by this study is predicated on process rather than politics,[167] the "political factor" requires further comment because of its impact on the process. The responses from the participants indicate their use of the process was influenced by the "political bias" of the Board. Allegations of political bias are subject to the infirmity of obscurity and for this reason the phrase "political factor" will be used to denote the many implications. One participant suggested that the comments had a twofold thrust; first, that the Board members themselves were constantly accused of being pro-labor or pro-management depending on the President who appointed them,[168] and second, that the NLRB process was challenged as inappropriate for an institution which was beholden to Congress and/or the President.[169] Whether or not this simple division is logically defensible, it presents a point of departure from the morass.

In considering complaints that Board Members are pro one side or the other, one initial distinction should be made. As member Brown said, "to ask if the Board is pro-union or pro-management is not only meaningless but is simply the wrong question . . . the Act expresses an initial policy and imposes some restrictions on both parties. . . ."[170] The

167 *See* note 61 *supra* and accompanying text.

168 *Compare* statements to the effect that unions' dissatisfied with political status and ready to take different political role. See 61 LRR 41 (1966); 61 LRR 190 (1966).

169 *But see* "Politics is now rightly viewed not only as unavoidable, but as essential to the formulation of policies that bear some rational relation to economic and technological conditions." Bernstein, "The Regulatory Process: A Framework for Analysis," 26 Law & Contemp. Prob. 329, 341 (1961).

170 Brown, "An Administrative Agency in a Changing World," Address to National Labor Relations Board Conference at Washington University, St. Louis, Mo., on Jan. 29, 1964 reported in 55 LRRM 93, 98.

issue involved is not the predilection of a particular Board member, but whether or not this "bias" has an affect on the manner in which he effectuates statutory policy. Even a severe critic of the "Kennedy Board" admitted that, "criticism . . . both of the Board's approach to decision-making and of its decisions, must not be construed as an attack upon its members. They are not unique."[171] If the "political factor" has any significance at all, the relevance must pertain to the manner in which Board members conduct their activities and not to the individuals themselves. Three types of activities are available to make a determination—speech making, rule making, and adjudication.

(a) *Speech Making and the "Political Foot"*

The reason that this is included within the topic of the "political factor" is because of the discussions of the political nature of the Board that are a reaction to speeches. For example, in 1962 Board Member Leedom stated,

> undoubtedly the very dynamics of industrial relations and the intensity of feeling that has historically accompanied organized labor's struggle to a place of influence in our economy, have led honest men throughout the history of the Board to depart too readily from sound judicial approach in an effort to right horrendous decisions *politically induced*, as *they believed*. Inevitably the labor views of the incumbent Board, as with all prior Boards reflect, at least to a degree, the economic and philosophical views of its members, which are *largely the predilections of the individual members' various experiences in life*. (Emphasis added.)[172]

A comparison of Member Leedom's statement and the second paragraph of Mr. McGuiness' book criticizing the "Kennedy Board" is self-explanatory, that is, "few informed observers would take exception to the view that the NLRB has been an agency where the interpretations of the law have been *peculiarly dependent on the predilections of its members*."[173] (Emphasis added.) Even though the Board has been a storm center since its creation,[174] Secretary Wirtz gave warning of

[171] McGinnis, The New Frontier NLRB 10 (1963).

[172] Leedom, "Recent Decisions and Changes at the NLRB," Address before the Labor Law Section of the Illinois State Bar Association in Chicago, Ill. on Jan. 19, 1962 reported in 49 LRRM 84, 85.

[173] McGinnis, *op. cit. supra* note 171, at 1.

[174] For a discussion of criticisms of the "Madden Board" (1935-1940), see Millis & Brown, From the Wagner Act to Taft-Hartley 243-46 (1950); the "Millis Board" (1940-1945), *supra* at 40-60; the "Herzog Board" (1945-1947), *supra* at 60-66; the "Truman Board" (1947-1952), "The NLRB, It's Past, Present and Future," 23 Tenn. L. Rev. 112 (1594); the "Eisenhower Board" (1952-59), Note, "The National Labor Relations Act Under a Republican Administration: Recent Trends and Political Implications," 55

such statements twelve years ago when he said "regardless of words, the serving notice that the meaning of federal labor law depends upon which party won the last election will inevitably diminish the influence of the law."[175] The fact that Member Leedom's statement may have meant that one's attitudes inevitably influence one's approach while Mr. McGuiness concluded that members' attitudes may have influenced the decisions does not preclude the analysis that both have given lip service to the impact of the "political factor," and to Secretary Wirtz' admonition. Moreover, there are independent reasons why such speeches are undesirable. Frequent appearances away from a crowded docket have given rise to criticism that such activity is too time consuming.[176] Defenses of Board positions impair the dignity of its members.[177] Perhaps the most significant reason speech making is undesirable arises out of the judicial nature of the members' positions. Speeches involving abstract issues appear different when applied, and they are easily misunderstood by the audience. One participant commented that speeches by Board members are totally unreliable even though they may portend authority. They give vent to the criticism that the NLRB "shifts with the tide." What is more important, they involve the personal attitudes of Board members with the process itself so that personal opinion and official activity become intertwined. As another participant wryly said, one of the Board Members is always putting his "political foot" in his mouth. The speeches concerning rule making and adjudication become an extension of the process, and because of this involve the members more deeply in the "political factor."

(b) *Rule Making, Adjudication, and Politics*

The rule making authority is given to the Board by statute and has been traditionally exercised by the issuance of "Rules and Regulations" published in the Federal Register (which normally concerns procedures

Colum. L. Rev. 852 (1955); Wirtz, "Board Policy and Labor-Management Relations-Employer Persuasion," N.Y.U. 7th Ann. Conference on Lab. 79 (1954); the "Kennedy Board" *compare* McGinnis, *op. cit. supra* note 171 *with* Grodin, "The Kennedy Labor Board," 3 Ind. Rel. 33 (1963). *See generally* Millis & Brown, *op. cit. supra* at 32-33, (the reasons for criticism (1) novelty of problems, (2) continuing opposition in industry and Congress, (3) division of labor movement, and (4) normal conditions of defense, war and postwar periods).

[175] Wirtz, *supra* note 174, at pp. 107-108.

[176] *See* Morse, "Perversion of the Taft-Hartley Act by the Eisenhower National Relations Board—A Call for Congressional Invstigation," Speech in the Senate of the United States, Mar. 23, 1956 at p. 21 reprinted by U.S. Gov't Printing Office (1956) (speechmaking versus case handling by General Counsel).

[177] Wollett, "The Performance of the National Labor Relations Board—A Clinical View," N.Y.U. 16th Ann. Conference on Lab. 193, 196 (1963).

to be followed by the charging parties) as well as by adjudication of cases.[178] Those who advocate that the Board should determine the substantive rules by adjudication, comprising most of the board chairmen, argue that the "multiple of variant fact patterns in which the Board must determine such matters as the appropriate unit and extent of bargaining in good faith are better adapted to adjudication."[179] The proponents of the regulation-by-hearing method admit that some matters are better limited to case-by-case handling, but state that rules of broad application are not. Futher, they believe that "rule making" under the Administrative Procedure Act protects the parties from the injustice of retroactivity, and increases predictability while at the same time providing a hearing.[180] The relative merits of each position are beyond the scope of this paper. However, the relationship of the dispute to the "political factor" is relevant. Reaction to this dispute indicates a widespread belief that this problem is politically oriented. An historical incident involving rule making versus adjudication will serve to illustrate this attitude.

In January of 1954, when for the first time the majority of the Board members were Republican, Chairman Guy Farmer made a speech in which he advocated gradual withdrawal of the NLRB from local disputes.[181] Member Rodgers made a similar statement in a speech two months later.[182] In July of the same year the Board, by issuing two releases,[183] announced new jurisdictional rules which it applied in the

178 Section 4(a) "General notice of proposed rulemaking shall be published in the Federal Register. . . ." Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. 1003(a). For a discussion of how Board Rules are effectuated see Forkosch, Treatise on Labor Law §§ 295-303, pp. 534-59 (2d ed. 1965).

179 McCulloch, "Rulemaking by the National Labor Relations Board," address before the Labor Law Section of the American Bar Association in the fall of 1964 reported in 56 LRRM 31. See also Friendly, The Federal Administrative Agencies—The Need for Better Definition of Standards 36 (1962). *But see* Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921, 972 (1965) (may be exaggerated issue).

180 *E.g.*, dispute between Labor Law Section of ABA and Board regarding contract bar rules. See 46 LRRM 40 (Board should reconsider views on establishing contract bar rules by case); 53 LRRM 51 (1963) (new contract bar rules violate APA § 10(e)); 56 LRRM 31 (1964) (contract bar rules by case have retroactive effect); ABA Sec. Lab. Law, in 1964 Proceedings 314 (1964) (use of APA rulemaking requirements not recommended).

181 Speech by Board Chairman Guy Farmer before joint conference of the Industrial Relations Committee of Edison Electric Institute, New Orleans, La. on Jan. 21, 1954 reported in Morse, *op. cit. supra* note 176, at 25.

182 Speech by making Rodgers before the American Bar Association at Atlanta, Ga. on Mar. 15, 1954. *Ibid.*

183 Press release, "N.L.R.B. Announces Changes in Standards for its Exercises of Jurisdiction." National Labor Relations Board Press Release No. 445, July 11, 1954;

Breeding Transfer case[184] three months later. This series of events brought forth a vitriolic speech by Senator Wayne Morse calling for a congressional investigation of the "Eisenhower Board."[185] Senator Morse stated in this speech that,

> It seems perfectly plain that an administrative policy, such as the Board's new restrictive standards on jurisdiction, which finds its genesis in a *purely political program*; which is designed to evoke an amendment of the act, not enforcement of the statutory policy as it stands; and which subverts, rather than effectuates, the act's patent objectives, is a usurpation of Congress' province, not the performance of administratively [sic] responsibility. (Emphasis added.)[186]

It is of no little significance that Senator Morse stated that the apparent desired change of statutory policy (to cede jurisdiction to State Courts) should be accomplished by Congress, as it was, and not by "packing" the Board.[187] The basis of Senator Morse's comments and the minority dissent from the *Breeding Transfer* case[188] which he cited,[189] were informal pronouncements of Board members. The fact that prior Boards had also been troubled by the same problem of jurisdictional standards did not forestall the criticism of "political bias" in this instance.[190] The heart of his complaint went "to the relationship between Congress and those who are responsible for effectuating its policies."[191] The "political program" was that of the executive. The dispute, therefore, was not whether there should be a "political program," but rather whose program should be applied. One social scientist theorized that "politics is now rightly viewed as not only unavoidable, but an essential to the formulation of policies that bear some rational relations to economic and technological conditions."[192] Whether or not one agrees with this philosophy, it must be recognized that allegations of "political bias"

"N.L.R.B. Announces New Standards for Exercise of Jurisdiction," National Labor Relations Board Press Release No. 449, July 15, 1954." Breeding Transfer Co., 110 N.L.R.B. 493, 500 n.6 (1954). *See* 53 LRRM 51 (Board also ignored own rules in making releases).

184 Breeding Transfer Co., *id.*

185 Morse, *op. cit. supra* note 176, at 26.

186 *Ibid.*

187 *Ibid.*

188 Breeding Transfer Co., *supra* note 183, at 502.

189 Morse, *op. cit. supra* note 176, at 25. *Compare* Senator Morse's speech, *supra*, *with* Member Murdock's dissent, Breeding Transfer Co., *id.* at 502-503.

190 *See* Millis & Brown, *op. cit. supra* note 174, at 243-46.

191 "[T]he clash [Board and critics] poses issues which go to the heart of the relationship between Congress and those who are responsible for effectuating its policies. . . ." Pucinski Report 65.

192 Bernstein, *supra* note 169, at 331.

may go to the question of separation of powers and not to the concept that the Board should be apolitical.[193] The "political factor" in this sense depends upon traditional notions of control of agency, and not upon the predilections of its members. As stated before,[194] this study is concerned with the question of whether the Board process, as part of the political process, can achieve its desired ends. The question still remains whether this dispute over approach affects Board process.

Impact may be analyzed by looking at the Board process from the standpoint of the parties who are on the receiving end of the rules promulgated. The argument can be advanced that this focus is wrong. Perhaps the actions of the Board should be analyzed at the point of contact. The participants were not hesitant in expressing their attitudes. One stated that the lack of continuity of Board decisions was so pronounced that an attorney could not advise his client as to the current status of the law with conviction.[195] Another told of inexperienced organizers and employees who had relied upon prior Board decisions only to their detriment when precedent was reversed. One of the participants added that not only was precedent reversed, but inconsistently applied. These comments go to consistency and reliance. The "political factor" relates to when changes in rules (made by the rule making process or adjudication) occur. The consensus of the participants was that there has been changing precedent commensurate with political shifts. Furthermore, there is strong argument from pro-union, pro-management, and neutral observers to the same effect.[196] Assuming that political shifts have evoked changes, the issue still remains as to how this shifting has affected the preferences of the parties. One answer to this question is that stare decisis is desirable, if not an inexorable command, because it affords predictability. Judge Friendly stated it in terms of the need for a better definition of standards, in his Holmes Lectures, because: (1) of the basic need that the law should provide like

193 Miller, "Malaise in the Administrative Scheme: Some Observations on Judge Friendly's Call for Better Definition of Standards," 9 How. L.J. 68, 72 (1963) (attempt to depoliticise agencies would founder on shoals of politics it seeks to eliminate).

194 See note 61 *supra* and accompanying text.

195 See Hills, "A Close Look at Three Administrative Policies," 3 Ind. Rec. 5, 13 (1964). "The criticism stands. The present Board ("Kennedy") has shown little or no consideration for the valid premises of stare decisis and as a result there is considerably more uncertainty, litigation, and cynicism concerning our federal labor laws. There are also charges of *union bias, which seem to me less valid.*" (Emphasis added.)

196 *Compare* Ratner, "The Quasi-Judicial NLRB Revisited," 12 Lab. L.J. 685, 689 (1961) (NLRB not arm of administration but of Congress) *with* Grodin, *supra* note 174, at 34 (may be inaccurate to call "Eisenhower Board" pro-employer but it did create more favorable atmosphere), *and* McGinnis, *op. cit. supra* note 171, at 26 ("Kennedy Board" determined to make own policy).

treatment under like circumstances, (2) of the social value in protecting the security of transactions, (3) of the need for a clear statement of standards, (4) of the necessity of maintaining the independence of agencies whose influence diminishes when vague standards exist, and (5) of the intra-agency advantage of reducing cases where certainty exists.[197] Each of these reasons provides a strong argument for the need to delineate standards, but the relationship of vague standards and increasing caseload requires further comment.

The participants analyzed increasing caseload in diverse ways. Some indicated that it was due to insecurity arising from vagueness. Others said that it was a sign of disrespect for the agency. Yet some responses indicated that the increase in caseload showed increasing reliance on the process. Most acknowledged the influence of other factors such as changing technology, the impact of unemployment, and weak enforcement of the decisions of the Board. Each of these reasons may be valid, but they fail to establish the causal nature of vague standards. Perhaps an overall evaluation of these diverse attitudes is possible by examining the problem in its labor relations context. As one participant saw the conflict, if the Board rulings mean that employers should encourage or want unions, they are ridiculous—this is a battle of containment. In labor relations the stakes of winning are high, and the tactics of the individuals involved have always reflected awareness of this fact. Carl Stevens, in his provocative book, *Strategy and Collective Bargaining Negotiations*, calls attention to the ambivalence in the relationship between unions and employers as being one of competition and cooperation.[198] Although the community may expect cooperation between the contestants, changing precedent presents an opportunity for resistance and use of the process a competitive tactic or what Professor Stevens refers to as a "move."[199] The traditional approval of lawyers of the doctrine of stare decisis and precise standards does not indicate that they would not (or should not) use legal opportunities when they are available. The impact of such use is obvious. Whether or not flexibility and direction obtained through the political nature of the process is desirable, the use of the institution by the parties to their advantage must be weighed.[200] If such "moves" provide the contestants with abundant opportunity for abuse of process rather than a forum

197 Friendly, The Federal Administrative Agencies, The Need for Better Definition of Standards 19-24 (1962).

198 Stevens, Strategy and Collective Bargaining Negotiation 2 n.5 (1963).

199 *Ibid.*

200 See S. Rep. No. 168, 87th Cong., 1st Sess. 6-7 (1961), suggesting lengthening terms of Agency members.

which contributes to industrial peace, then the criticisms are valid politics notwithstanding. Accordingly the use and nature of the process should be examined.

2. Bureaucratic Structure and Process

The responses of the participants were rife with complaints about structure and process. A frequent allegation heard was that the NLRB was "top heavy," and use of its process futile. One participant said that by the time you could find out about a rule it was changed. He stated that the entire procedure was "enshrouded by red tape." Another suggested that the mechanistics of the Board had to be bureaucratic because the personnel were young, inexperienced, and prosecutorial necessitating levels of supervision and rules. Others suggested that the parties lost control of the action once it had commenced. They used as an example the fact that a charging party only had the right to an investigation and not a formal hearing;[201] and that once a charge was filed, the parties did not control the action in the same sense that they did in arbitration (or litigation). When the suggestion was made that the incidence of settlements and withdrawals in unfair labor practice cases did not indicate loss of control,[202] the response was that settlements were indicative of bureaucratic pressure. The nature of the settlements was said to prove the existence of this pressure. The constraint to hold down the caseload before the Board was charged to the Office of the General Counsel (OGC). A further complaint was that the "so-called administrative advantage of informal hearings was a myth," because the rules of evidence applied by the Trial Examiner were "medieval." Moreover, exceptions to the Trial Examiner's decisions were viewed by Board Members through the "prismatic lense" of their assistants who had virtually no experience in the field. Appeal from "bad decisions" was costly thus putting more pressure to settle on the parties. Several participants indicated that even when a remedy was provided, it was often ineffective. Prior to any discussion of these allegations, it is necessary to consider the inter-relationship of the various divisions of the NLRB.

A rough outline of the NLRB organization is sufficient to enable a comprehension of the basic relationships of the divisions. The Taft Hartley amendments created the independent Office of the General

201 Rules and Regs, § 101.6: "The regional director thereupon [after investigation] informs the parties of his action . . . and the complainant of his right to appeal to the general counsel in Washington, D.C., within 10 days."

202 *See* Rules and Regs, § 101.9(a): "Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law."

Counsel[203] (including Division of Litigation, Division of Operations, and Division of Administration)[204] who is appointed by the President for a four-year term with the advice and consent of the Senate; and who now controls the Regional Offices through the Division of Operations.[205] The General Counsel has authority over the investigation of charges, the issuance of complaints, and case presentation before the Board. The Board is comprised of the five members who are also appointed by the President with the advice and consent of the Senate for staggered five-year terms who have control over their own staffs and divisions.[206] The Board has authority to make, amend, and rescind such rules and regulations as necessary to carry out the provisions of the Act.[207] It also has authority to establish regional agencies, appoint regional directors, and regional attorneys even though this personnel is under the supervision of the OGC.[208] Furthermore, the Board under the Landrum-Griffin amendments was given power to delegate certain authority, including representational elections, to the Regional Offices.[209] Each regional office is headed by a director (supervisor), and is assisted by the regional attorney (law officer), and an assistant to the regional director (investigating and processing officer). The field examiners are

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203 61 Stat. 136, 29 U.S.C. §§ 153(d), 154.

204 Division of litigation includes: Supreme Court Branch and Appellate Branch; Legal Research and Special Projects Branch and District Court Branch; and Office of Appeals. Division of Operations includes: Regional Advice Branch and Time and Performance Branch; Regional Case-Handling Branch and Administrative Services Branch; and Regional Offices. Division of Administration includes: Budget and Finance Branch and Personnel Branch; and Organization & Methods Branch; Statistical Analysis Branch; General Services Branch; and Library. National Lab. Rel. Org. & Methods Branch, National Labor Relations Board Organization Chart (6PO 873-601 1963).

205 Purpose was to centralize responsibility for Regional Office operation. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 37 (1949); Pucinski Report 31-34.

206 National Labor Relations Act § 3(b)-6, 49 Stat. (1935), as amended 61 Stat. 136 (1947), 29 U.S.C. §§ 153(b)-156. Board includes: Legal Assistants, and Office of the Solicitor; and has control over Office of Executive Secretary, Office of Representation Appeals, Division of Information, Division of Trial Examiners (Branch Office San Francisco). National Lab. Rel. Org. & Methods Branch, *op cit. supra* note 204.

207 National Labor Relations Act § 3(b)-6, 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), 29 U.S.C. 153(b)-156.

208 National Labor Relations Act § 4(a), 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), 29 U.S.C. 154(a).

209 Labor-Management Relations Act of 1947 §§ 3(b), (c), (e), 61 Stat. 136, as amended 73 Stat. 519 (1959), 29 U.S.C. § 153(b),(c), (e). In representation cases, the 31 Regional Directors have had authority (since May 15, 1961) to process all petitions, rule on contested issues and direct elections or dismiss the request subject to review by the Board members on limited grounds. Rules and Regs. §§ 101.17-101.21. See also Jurisdictional Dispute Cases under Sec. 10(b) of the Act, Rules and Regs, §§ 101.31-101.36. *See generally* 48 LRRM 85.

appointed by the regional office,[210] and should be distinguished from trial examiners who, although nominally a division of the Board, are civil service employees and are appointed for specific hearings by the Division of Trial Examiners.[211]

The allegations of "bureaucratic red tape" actually encompassed every stage of the process, and for the sake of simplicity, treatment of the NLRB process will be by stage.

(a) *The Regional Office*

The channels of activity at the regional office are expressly governed by the "Rules and Regulations and Statements of Procedure" (published in the Federal Register),[212] and the "National Labor Relations Board Case Handling Manual" (a confidential document relating to the internal management of the agency) which provides that adherence to its rules is compulsory on agency personnel.[213] Since the "Rules and Regulations" are published but the "Case Handling Manual" is not, a description of the operation of the latter on the process is of interest. In general the manual details procedures and sets up channels of activity. For example, it provides how a charge when received is assigned for investigation, and the relationship of the field examiner to his superior in preparing a "final investigation report" (FIR).[214] It details the new requirement that the FIR, together with

210 In the Boston Regional Office, field examiners are lawyers, and are often assigned as trial attorneys on the cases they have investigated. There is a strict separation of functions maintained in representation cases between field examiners and hearing officers who are selected from agency personnel.

211 Administrative Procedure Act, 60 Stat. 237 (1947), 5 U.S.C. 1010 (1958). National Labor Relations Board Trial Examiners have a civil service rating of GS-16 (salary range $18,935 to $24,175). Specific requirements for appointment in this field are: 2 years experience in preparation, presentation, hearing of formal cases, making decisions of record originating before governmental regulatory bodies (federal or state level) arising in field of labor law; passing grade on examination. Announcement No. 318, Hearing Examiner 2, 18, 21 (U.S. Gov't Printing 1965).

212 Administrative Procedure Act § 3(a), 60 Stat. 237 (1946), 5 U.S.C. 1003(a) (requires publication).

213 Query: what effect will the new act to amend sec. 3 of the Administrative Procedure Act insofar as public access to government information is concerned. The Act becomes effective July 4, 1967. Pub. L. No. 89-437, 80 Stat. 250, 89th Cong., 2d Sess. § 3(a) (July 4, 1966).

214 The operation of field examiners within the Regional Offices was a point of criticism by the participants who alleged inexperience due to turnover, and the combination of field examiner-prosecutor to be undesirable. *See* General Counsel Ordman's statement that NLRB was graduate school for labor relations lawyers, 61 LRR 98 (1966). However, practice of raiding government agencies by private parties is well known, and criticism by parties should be directed to the source of the problem rather than agencies.

affidavits and other materials, be handled by a tripartite committee (Regional Director, Regional Attorney, and Assistant to the Regional Director) to determine what action should be taken on the charge. Previously this matter was handled by the Regional Director (who still has sole responsibility for the issuance of a complaint) in any manner that he thought best. The committee is given instructions as to the manner and criteria for settlement, dismissal, or amending the charge. Further, the committee is to determine whether the charge has "merit" and a complaint should issue, but the only criteria mentioned is the obvious one of establishing a "prima facie" case. If "merit" is found, the manual provides that the Regional Attorney should assign the case for hearing to a trial lawyer who assists the general counsel who receives the case. Criteria are outlined for informal settlements (including non-admission clauses) at this stage, and so on. The confidential manual would seem to vest a large area of discretion with the committee, but this is deceptive. The manual contains a detailed list of situations where it is mandatory for the regional director to consult the "Regional Advice Branch" of the Division of Operations which is under the supervision of the OGC. "ADVICE" is to be consulted on matters of national importance, where wide-spread publicity may be involved, or where novel questions are presented. Moreover, the regional director is to forward all charges where "hot issues" such as secondary boycotts, picketing, and "hot cargo" problems exist. The regional office must also consult on settlements, as well as complaints, in regard to these issues. Further, non-compliance with prior orders, or unusual remedies (subpoenas and discretionary injunctions), even though unconnected with the above listed issues, must also be submitted. Since the situations detailed for referral constitute the heart of the Act, the OGC demonstrably can be shown to have an important voice in the operation. In addition to the express provisions contained in the "NLRB Case Handling Manual" and the policy decisions made by "ADVICE", there are indirect pressures which affect the operation of regional offices.

In 1958 the NLRB contracted with McKinsey & Co., Inc., a management consultant firm, for an evaluation of its organization and administration. The report[215] was severely critical of the lack of efficiency in the operation of the NLRB. The significance of this report cannot be evaluated quantitatively, but from 1959, when Stuart Rothman was appointed as General Counsel,[216] an era of efficiency

No figures were available as to the combination of functions (investigatory and prosecutorial), but practice is based on exigency and bears further study.

[215] Reprinted in full in Pucinski Report 1619-1724.

[216] Mr. Rothman was appointed June 20, 1959.

(appropriately called "target consciousness") has developed.[217] An example of the use of "target dates" was the unilateral announcement to the regional offices that field examiners were to meet a thirty-day deadline in investigations.[218] The ever-present pressure to reduce the mounting caseload must also be added to "target consciousness" as an indirect pressure on regional offices.[219] However, in evaluating the direct and indirect pressures, several countervailing factors should be mentioned. The McKinsey evaluation did indicate serious duplication and inefficiency existed in regional offices,[220] and the drive toward efficiency has had a corrective influence.[221] Further, in 1961 the Board delegated the decision-making authority in representation cases, among other things, with permission of Congress; and this has resulted in cutting in half the processing period of petitions as well as relieving Board members of this work.[222] Finally, the present relationship between the regional offices and the OGC cannot be said to deprive the regional offices of all discretion in handling cases. The fact that under the current rules appeals from a regional director's decision as to the disposition of a charge may be taken only to the Office of the General Counsel was subject to comment by the participants. The basis for this rule was the desire to place the regional offices under an Independent Office of the General Counsel.[223]

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217 *See* Rothman, "Some Law and Practice Problems Before the Office of the General Counsel," N.Y.U. 14th Ann. Conference on Lab. 163, 166 (1961) (development and utilization of procedures designed to achieve dispatch); Rothman, "In Search of Helping the Administration of the National Labor Relations Act," address before Fifteenth Annual Fall Industrial Conference of the Associated Industries of Cleveland, Ohio on Oct. 20, 1962 reported in 51 LRRM 79. *See also* ABA Sec. Lab. Law, 1965 Proceedings 387 (1965) (problems existing in rigid application of "target dates").

218 A collateral question that should be investigated is the relationship between the quality of the varied types of investigation and the speed required by "target dates."

219 Recognition of this relationship is indicated in 30 NLRB Ann. Rep. 11 (1965) "With increased workload on NLRB regional offices resulting from the higher number of unfair labor practice cases filed, and the increased number found to have merit, the median time in fiscal 1965 from filing of charges to complaint issuance was 59 days. Median time in fiscal 1964 was 56 days."

220 Pucinski Report 1636-1701.

221 *See* General Counsel Ordman's testimony before the House Special Labor Subcommittee on Feb. 14, 1966 reported in 61 LRR 97.

222 *See* 29 NLRB Ann. Rep. 16-18 (1964). Average time cut from 89 days in 1961 to 39 days in 1964, *supra* at 17.

223 *See* Pucinski Report 1656-57. In 1964 the ABA's Labor Law Section came out in opposition to changing this procedure because: (1) it would undermine existing statutory separation of powers, (2) there was no evidence that OGC not living up to its responsibility, (3) internal review procedure sufficient, and (4) it would increase Board's staggering work load. ABA Sec. Lab. Law, *op. cit. supra* note 180, at 325-30.

(b) *The Office of the General Counsel*

McKinsey & Co. recommended that the responsibility for the operation of the regional offices be centralized in the OGC ("The General Counsel Plan") for the following reasons: (1) to achieve a clear cut separation of investigation and adjudication within the agency, (2) the need for a single executive to handle the various operations, and (3) the desire to free Board members from this responsibility to afford them more time for decision making.[224] The report contained the caveat that this might isolate Board members from policy matters, but suggested that they should retain responsibility for key policymaking, and, further, that the General Counsel should be held accountable to the Board.[225] Obviously Congress believed that subjecting the General Counsel to the appointive process was a sufficient check against the arbitrary use of power, and that the reasons for centralization were persuasive.[226]

The complaint that the General Counsel does not provide adequate review of dismissals has been denied, but there are no official figures to indicate the number of reversals.[227] The "unofficial figures" estimate ten percent. However, the validity of this charge must be weighed against the reason for separation and the internal process of reviewing dismissals. The Labor Law Section of the American Bar Association reported in 1964 that the internal review was sufficient to rebut the charges.[228]

(c) *The Hearing*

Twenty-five years ago Professor Gelhorn stated, "the agencies' cautious emulation of their judicial bretheren has not, unfortunately, proved to be an unmixed blessing . . . largely as a consequence, administrative agencies have not wholly succeeded in providing, as it was intended they should, a speedy form unhampered by legal technicalities and burdensome delays."[229] According to some of the participants, the Federal Rules of Civil Procedure are far more liberal than those

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224 Pucinski Report 1632. For bitter conflict developing between the General Counsel and the Board, see Klaus, "The Taft-Hartley Experiment in Separation of the National Labor Relations Board Functions," 11 Ind. & Lab. Rel. Rev. 371 (1958); 96 Cong. Rec. 6883, 6964 (1950).

225 Pucinski Report 1633.

226 *See* H.R. Rep. No. 510, 80th Cong., 1st Sess. 37 (1947).

227 *Compare* General Counsel's testimony before House Special Labor Subcommittee on Feb. 9, 1966 reported in 61 LRR 108 (figures belie attempt by OGC to proceed only on sure things).

228 ABA Sec. Lab. Law, *op. cit. supra* note 180, at 328-29.

229 Gellhorn, Federal Administrative Proceedings 81-82 (1941).

applied by the trial examiners.[230] One authority has stated that, "the trend [throughout the entire legal system] is toward replacing evidence rules with discretion, admitting all relevant and useful evidence, and basing findings on evidence on what responsible persons rely in serious affairs."[231] Nothing in NLRB hearings, according to one participant, justifies any other procedure. However, empirical study of this problem is wanting.

(d) *Board Remedies*

Leaving aside the problem of administration of caseload by Board members, another aspect of the futility of using the Board relates to the remedies provided by statute. Several of the participants admitted that there is evidence the remedies provided are not working, and this reflects a serious disability of the Board to effectuate the purposes of the statute that goes beyond the question of delay. Since interference with employment status by employers and unions constitutes the majority of all unfair labor practice cases filed,[232] the remedies provided where an infraction is found are appropriate to consider. In 1965 a study led Mr. Bernard Samoff[233] to conclude that statutory protection against union interference "hardly provides adequate protection for the working man against the storms of industrial life."[234] Another study, taken from the Boston Regional Office records, concerning employer interference led the author to conclude that, ". . . notices and back pay alone do not seem to be effective in restoring the 'status quo ante' "[235] "Reinstatement," he observes, "was a much abused remedy."[236] His study indicates that although 80 percent of the discriminatees indicated a willingness to accept reinstatement, only 44 percent accepted, and only 13 percent remained.[237] The author states that the NLRB has put heavy emphasis

230 For the view that generalizations about the application of the federal rules by courts are questionable, see Wright, Federal Courts § 93, p. 357 n. 4 (1963).

231 2 Davis, Administrative Law Treatise § 14.17, p. 335 (1958).

232 National Labor Relations Act §§ 8(a)(3) 8(b)(2), 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), 29 U.S.C. § 158(a)(3), (b)(2). Section 8(a)(3) cases represent 67.4% of all 8(a) cases; and § 8(b)(2) cases represent 31.5% of all 8(b) cases. 30 NLRB Ann. Rep. 180, Table 2 (1965).

233 Samoff, "The Impact of Taft-Hartley Job Discrimination Victories, 4 Ind. Rel. 77 (1965).

234 *Id.* at 94.

235 Aspin, A Study of Reinstatement Under the National Labor Relations Act 86 (doctoral thesis submitted to Massachusetts Institute of Technology 1966). Compare Holly, "The Arbitration of Discharge Cases: A Case Study," in Critical Issues in Labor Arbitration 1 (McKelvey ed. 1957) (inability to select sample rendered statistical measure impossible).

236 Aspin, *id.* at 98.

237 *Ibid.*

on informal settlements due to a belief that it would facilitate satisfactory compliance, but this was not substantiated by his survey.[238] The pervasive reason for settlement, in his opinion, is that,

> Heavy pressure is put on the Regional Office to settle the cases informally. Periodic memoranda from Washington inform the Regional Office when its percentage of Informal Settlement falls below the national average. To survive, then, it becomes necessary for the NLRB to have a large number of Informal Settlements. As the caseload increases it is going to become even more meaningful.[239]

Thus the empirical evidence which tends to substantiate the complaint that Board remedies are ineffective, indicates that OGC pressure and futility of process are closely related to increasing caseload and delay. The structure of the Board must be evaluated in light of how the agency responds to charges and cases presented. Is the structure of the NLRB satisfactory to enable it to perform the purposes of the statute?

3. The Caseload and Time Lag Problem

Before consideration of caseload and time lag problems it is necessary to state a few figures. In the ten-year period up to and including 1965, the total caseload of the NLRB increased 109 percent.[240] However, the unfair labor practice cases reflect an increase of 156 percent during this period.[241] "Since," the NLRB reports, "these cases require more manpower and more processing time than do employee representation cases [now handled by the Regional Offices] in measuring Agency workload the growth in unfair labor practice charges must be gauged in higher terms than mere numerical or percentage gains."[242] This growth requires detailed analysis, and the following chart will provide specificity.

Two facts are evident. First, the percentage increase by year is erratic, and the 156 percent growth[243] over this period was not steady. Second, and most important, the period from 1961-64 reflects an upward trend in the rate of growth.[244] Numerically the 4 year period of 1961-64 reflects the highest growth (+3,128 cases) even though the

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238 *Id.* at 105.

239 *Ibid.*

240 Figures compiled from NLRB 20-30th Ann. Rep. (1955-1965). The total case increase for this period was 14,634 charges, *supra.*

241 20 NLRB Ann. Rep. 5 (1955); 30 NLRB Ann. Rep. 7 (1965).

242 29 NLRB Ann. Rep. 4 (1964).

243 *See* note 240 *supra.*

244 *See* note 241 *supra* and accompanying text.

THE GROWTH OF UNFAIR LABOR PRACTICE CHARGES[245]

Year	Charges Filed	% Increase or Decrease By Year	Rate of Increase by Four Year Periods	Trend of Increase Comparing Four Year Periods
1955	6,171 chgs.	+03%	—	—
1956	5,265 chgs.	—15%	—	—
1957	5,506 chgs.	+05%	—	—
1958*	9,260 chgs.	+68%	51%	Base
1959	12,239 chgs.	+57%		
1960	11,357 chgs.	—07%		
1961	12,132 chgs.	+07%	+31%	—07%
1962	13,479 chgs.	+11%		
1963	14,166 chgs.	+05%		
1964	15,260 chgs.	+13%**	+26%	+08%

* 1958 was selected as the base year (base period 1955-1958) because it reflected the largest percentage increase over a preceding year.

** 1965 showed an increase of +04%.

percentage growth is the smallest (+26 percent). The trend of growth, however, is up 15 percent over the 1958-1961 period.[246]

Evaluation of the rising caseload (particularly in unfair labor practice cases) should be in terms of impact on the process. For this purpose a useful comparison may be made between the 1958 figures used by McKinsey & Co. and 1964 figures[247] made available by the NLRB. The first comparison involves "merit factor" (determination that the charge has validity) and settlements. The second, indicates a comparative analysis of time lag by stage of process.

To state the results of the comparison in percentage, a 69 percent case increase (with a 12.7 percent increase in merit findings) occasioned an increase of 279 percent in pre-complaint settlements, and an increase of 223 percent in post-complaint settlements. The enormous increase in settlements in this seven-year period is very interesting when viewed in light of the time lag change in this period. This is broken down into

[245] Thomas Kenney, NLRB Assistant General Counsel, stated in a speech before the Federal Bar Association, in the fall of 1965 reported in 60 LRR 73, 74, that the "Board is now handling the large volume of 30,000 cases per year, and there is no reason to think that it won't reach 60,000." See also McCulloch, "The Policy, The Purpose and The Philosophy of the NLRB as Revealed in Decision Trends," reported in 60 LRR 145, 147 (1965) (Board couldn't handle if 95% weren't disposed of voluntarily).

[246] *See* note 243 *supra* and accompanying chart in text.

[247] *Compare* Pucinski Report 1696, exhibit 4-1 *with* NLRB Form M-3a (for agency use only).

UNFAIR LABOR PRACTICE CHARGES—MERIT AND SETTLEMENT[248]

Year	Charges Filed	Merit Factor %	Pre-Complaint Settlements	Post-Complaint Settlements
1958	9,260 chgs.	20.7%	725 cases	262 cases
1964	15,620 chgs.	33.4%	2,750 cases	846 cases
Increase*	6,360 chgs.	+12.7%	2,025 cases	584 cases

* In 1965 there was a continued increase except for post-complaint settlements.[249]

three stages: (1) the processing of a charge, (2) the formal hearing of a complaint, and (3) Board hearing on exception from the trial examiner's decision. It is important to note that the time (expressed in days) is median time and not average time.

UNFAIR LABOR PRACTICE CASES—STAGE & MEDIAN PROCESSING TIME[250]

Stage	1958	1964	Increase or Decrease
(1) *First Stage*			
Number of Complaints Issued	541 cases	1,890 cases	+1,349 cases
Median Days to Process	116 days	56 days	— 60 days
(2) *Second Stage*			
Number of Decisions Issued	289 dec.	734 dec.	+ 445 dec.
Median Days Required	117 days	159 days	+ 42 days
(3) *Third Stage*			
Percentage of Cases to Board	5.6%	5.4%	— .2%
Number of Cases to Board	353 cases	865 cases	+ 512 cases
Median Days Required	278 days	136 days	— 142 days
Total Days Required To Process	511 days	351 days	— 160 days

[248] Figures compiled from 20 NLRB Ann. Rep. 1-3, 5 (1958) and 29 Ann. Rep. 9-23 (1964).

[249] In 1965, 15,800 unfair labor practice charges were filed. The merit factor rose to 35.5%. There were 3,003 pre-complaint settlements, and 821 post-complaint settlements. 30 NLRB Ann. Rep. 9-14 (1965).

[250] Figures compiled from reports cited in note 247 *supra*. Note figures represent *median* processing time (indicating one-half processed faster and one-half slower).

Despite an increase of 249 percent in *complaints* (not charges) actually issued, the median days required to process these cases fell by more than 50 percent. Due to the increase in complaints, a decrease of .2 percent in unfair labor practices going to the Board resulted in an increase of over 500 cases which substantiates the significance of the OGC pressing for settlements in order to reduce Board caseload. Despite the fact that the Board members had an increase of 145 percent in unfair labor practice cases, they cut the time required to process these cases byover 50 percent. In fact the entire time to process these cases (median time) in all stages declined by 31 percent.[251] Several inferences can be drawn from these facts. First, the significance of settlements in light of the dramatic increase in charges filed (charges up 6,360 in seven-year period) cannot be denied. This would explain the pressure from the OGC for settlement. Second, it is important for the OGC to limit the number of cases going to the Board members for decision. Even though more cases went to the Board (an increase of 512) during this period and there was a decrease in handling time (a decrease of 142 days), the decrease was due to incresed efficiency and the delegation of representation cases to the regional offices.[252] It cannot be assumed that continued increases will not cause a serious breakdown of the Board process without other delegations and greater pressure for settlements. Third, the median days required for Board cases is just under one year, but one-half of the cases take much longer. For example, the variation from the total median days, that is, median time was 389 days while longest time was 879 days,[253] is considerable.

[251] One explanation for this is that representational cases (R cases) are handled by the Regional Offices (since 1961). In 1964 the Regional Offices issued 1,890 decisions of which the Board reviewed 379. 29 NLRB Ann. Rep. 17 (1964).

[252] *Ibid.* See Rothman, *op. cit. supra* note 217, at 79 (efficiency needed to handle increases).

[253] For comment that median figures don't tell entire story, see Pucinski Report 10. Indication of how median figures (those used in annual reports) may be misleading can be gleaned from NLRB Form M-3a chart for period of January till June 1965 showing median, low time, high time, lower quartile, and upper quartile figures.

Unfair Labor Practice Cases* (Jan.-June 1965)

	Filing to Complaint	Complaint to Close of Hear'g	Close of Hear'g to Decision
Median	60 Days	71 Days	119 Days
Low	5 Days	22 Days	26 Days
High	450 Days	315 Days	384 Days
Low Quartile	46 Days	57 Days	74 Days
Upper Quart.	95 Days	94 Days	170 Days

In a field where time is of the essence, the time lag shown gives substance to the statements of futility expressed by the participants. Moreover, pressure for settlement is not desirable per se. If the policies of the act are to be effectuated, "merit," not caseload, should determine whether complaints should issue and be pressed. Further, once a complaint issues, based on "merit," attention should be paid to the nature of the settlement. Otherwise settlement may become another "move" available to the contestants. In light of this empirical evidence the question posed by one of the participants may well be asked—"is the tail wagging the dog"?

4. Summary

Any analysis of Board process requires an answer to the critical problem of why the trend of Board caseload is upward in light of the statutory policy to preserve industrial peace.[254] In 1939 Professor Lon Fuller provided the key to answering this question. "The great accomplishment of legislative reform of recent years," he said, "such as the Securities Exchange Act and the National Labor Relations Act, will probably not be firmly established until the philosophy which underlies them has gone over into and become a part of the common law. In the long run men are ruled by accepted beliefs, not by legislative fiat."[255] Assertions, however, must not be measured abstractly. For example, to accept charges that the NLRB is subject to political bias without relating this to process is to ignore the purpose for which the Board was established—to ". . . define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the right of the public in connection with labor disputes affecting commerce."[256] On the other hand, the "political factor" cannot be ignored as it affects process. As Board members align

	Trial Exam. Dec. To Bd. Decision	Total Time	Variation From Median Time
Median	116 Days	389 Days	-
Low	43 Days	128 Days	261 Days
High	566 Days	879 Days	490 Days
Low Quartile	87 Days	319 Days	70 Days
Upper Quart.	177 Days	491 Days	102 Days

* These figures cover cases originating from Boston Regional Office.

254 *See* note 6 *supra.*

255 Fuller, Book Review, "The Formative Era of American Law, Pound," 34 Ill. L. Rev. 372, 373 (1939).

256 National Labor Relations Act § 1(a), 49 Stat. 449 (1935), as amended 61 Stat. 136 (1947), 29 U.S.C. § 151(a).

themselves with shifts in political parties by speech making, rule making, or adjudication, they provide the parties involved with tactics whereby one contestant can gain an advantage over his adversary.[257] If such tactics allow abuse of process, the parties will not hesitate to use them in light of the "table stakes" involved.[258]

There is sufficient empirical evidence to support the contention that the NLRB structure is subject to such abuse. The OGC centralized control of what was proven to be an in efficient regional structure. The OGC undoubtedly has improved the operation through centralization. However, despite the fact that there is no evidence to support the contention that the OGC has abused its power, there is evidence to indicate that the increasing caseload has resulted in tremendous pressures for settlement. Moreover, rigidity of hearings and futility of Board remedies reinforce such pressures. The trend in caseload and settlement indicates that these pressures will not abate. Each of these factors makes it possible for the parties to interpose their preferences even though contrary to statutory policy. This conclusion does not prove that different institutional characteristics would produce a system where the preferences of the parties would not prevail. It does show how these preferences work within the present framework of the NLRB process. The final question to be considered is whether such analysis is useful in resolving the problems existing in labor relations today.

III. Relevance: Possible Applications of the Participants' Evaluation

Space limitation prohibits exhaustive application of process analysis to the myriad labor relations problems. This will have to await exposition at a later date. Three examples will be used to indicate the relevance. The first two concern internal problems within each institution. First, the problem of nonacceptance of new arbitrators will be discussed. Second, this paper will consider the suggestion that caseload (and undesirable pressures for settlement) can be relieved by limiting Board review. The third application will deal with process difficulties arising out of Board deference to arbitration.

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257 *See Hall*, "Responsibility of the President and Congress for Regulatory Policy Development," 26 Law & Contemp. Prob. 261, 275 (1961) (inconsistency in legislation reflects inconsistency in country at large).

258 *Compare* Fanning, "Labor Issues Before the Supreme Court," Address at Loyola University School of Law, Oct. 20, 1959 (press release No. 634) (line between legality and illegality grows thinner), *with* McCulloch, *op. cit. supra* note 245, at 146 (we see a more sophisticated probing to find every possible loophole in the statute).

A. *The Training of New Arbitrators and Acceptability: Catching Up With the Demand*[259]

One of the participants believed it unnecessary to train great numbers of new arbitrators, but said that proper training of small groups was essential, and could be accomplished best by regular academic instruction. Preferably, he thought, this training should be through an inter-disciplinary study in economics, law, and business courses. In a recent article, Professors Jones and Smith suggested that the appointive agencies have "the greatest opportunity and perhaps the major responsibility in this area [placing new arbitrators]."[260] They noted that the agencies should be careful in selection, and suggested that qualifications be checked, apprenticeships be established, and new names should be circulated.[261]

A brief survey of the recent but intensive study of this problem indicates the difficulties. In 1950 the National Academy of Arbitrators Committee on Research and Education proposed a twofold training program (to train new arbiters and help others acquire more ability) that included the study of reported cases, attendance at hearings and initial conferences, and involvement in less complicated cases at lower fees.[262] Five years later, a subcommittee suggested programs of internship with appointive agencies and individual arbitrators, and increased instruction.[263] A survey was taken in 1960 at the behest of the editor of publications of the NAA to evaluate the less than twelve existing apprenticeships.[264] Mr. Zack found that three out of the seven who replied had succeeded in arbitrating cases of their own after the program. He concluded that: (1) all apprentices would not succeed, (2) the apprenticeship program takes several years, (3) scholastic training was insufficient alone, and (4) trainees would need mediation experience, work with appointive agencies (but not government or legal

259 For a less current reform plan, *e.g.*, to amend the United States Arbitration Act, 61 Stat. 669 (1947), as amended 68 Stat. 1233 (1954), 9 U.S.C. §§ 1-14, see Note, "Proposed Labor Arbitration Law," 9 Lab. L.J. 306 (1958); "Panel Discussion: The Proposed Uniform Arbitration Act," in Critical Issues in Labor Arbitration 112 (McKelvey ed. 1957).

260 Jones & Smith, "Report with Comments," 62 Mich. L. Rev. 1115, 1133 (1964). *Compare* Workshop, "The Development of Qualified New Arbitrators," in 1962 Proceedings NAA 205-28.

261 *Ibid.*

262 Committee on Training New Arbitrators, "Appendix D Replenishment of Professional Arbitrators," in 1964 Proceedings NAA 317-18.

263 Subcommittee on Education and Training, "Appendix E Report and Recommendations," in Management Rights And the Arbitration Process 230 (McKelvey ed. 1956).

264 Zack, "Appendix C, An Evaluation of Arbitration Apprenticeships," in Challenges to Arbitration 169 (McKelvey ed. 1960).

work because of the label of "bias"), and apprenticeship.[265] Again in 1962, the National Academy held a panel discussion. The panel included the American Bar Association, Labor Law Section Chairman and representatives from the appointive agencies.[266] The purpose was to evolve uniform methods of training, and ways of gaining acceptability. There was less than complete agreement among the panel as to the methods of achieving these objectives.[267] Finally in 1964, the Committee for the Replenishment of New Arbitrators (NAA) reported the progress to the membership.[268] It stated three conclusions. First, most of the work of training had been left to the appointive agencies. Next, only 14.5 percent of the arbitrators contributed as trainers, and last, that most of the accepted arbitrators had not had prior training. The percentage of those who had apprenticeships had remained constant for two decades.[269] Accordingly, the committee announced that the National Academy had agreed with the appointive agencies to run a "Chicago Training Program" as a pilot model for those areas in the country where there was a shortage of available and qualified arbitrators.[270] The program lasted from September of 1962 to December 1963, and included fourteen selected trainees (five of whom did not complete the program). If one trainee, who withdrew because he felt the program was hurting him, is eliminated from the statistics, the short-run success of the project must be considered poor. Of the 190 submissions of the trainees as arbitrators during the year, there were three acceptances involving two trainees.[271] The report indicated that "it is possible that one or two arbitrators may yet emerge from this program."[272] The participants indicated that results of similar programs in Pennsylvania and Ohio were not much improved.[273] This approach cannot be considered an overwhelming success statistically.

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265 Mr. Zack suggested: (1) a public relations program, (2) apprenticeship extensions, (3) a clearing house for information, and (4) work programs at unions and companies. *Id* at 173.

266 Mr. Livingston (ABA) suggested tighter standards. Mr. Simkin (FMCS) stressed screening procedures. Mr. Herzog (AAA) indicated problem of "blacklistings." Mr. Seward (NAA) said classroom and apprenticeship of little value. Workshop, *supra* note 260, at 205-08.

267 *Ibid.*

268 Committee on Training New Arbitrators, *supra* note 262, at 317.

269 The reasons listed were the personal relationship between the arbitrator and their clients, and the time-cost factor to the trainees and their instructors. *Id.* at 320.

270 *Id.* at 324. Note that the unions accepted 47 times and management 21 times, exclusive of the trainee who withdrew.

271 *Ibid.*

272 *Id.* at 324-25.

273 *See* ABA Sec. Lab. Law, 1965 Proceedings 254-56 (1965) for a different approach used in St. Louis, Mo. where ABA sent list of 29 persons screened to appointive agencies.

It is possible, however, to analyze this problem in light of the information derived from the participants. The acceptability of new arbitrators is related to the selection process. In his report Mr. Zack stated that even "qualified people" may not be acceptable.[274] It is the necessity of "acceptability" rather than a lack of organized effort to train new people that limits entry. Therefore, any plan to be successful must take this into consideration. The problem is one of supply and demand. Emphasis on supply is not enough, even though the supply must include qualified people. "Qualification" will be screened by the selection process, but the demand is not entirely sensitive to variation in qualifications because "ability" is not the only criteria. The problem is to influence the demand. The solution may not lie with the appointive agencies, because they cannot retain their neutral position and at the same time become embroiled in the selection process. An individual and persistent appeal must be made to unions and management personnel who select arbitrators. For example, a prestigious organization like the National Academy might establish a committee to seek out the selecting parties, and ask them to evaluate their arbitration problems and agree to a panel consisting of new names, from whatever appointive agency they use, for less important cases.[275] The parties would select from such a list of qualified but new people. Information concerning such an agreement could then be passed on to the appointive agencies who could screen new names for those submissions. The difficulty with reported pressures exerted thus far might be that they have been made by "vested interest" agencies or by general appeal (as opposed to individual appeal) in connection with specific problems and existing relationships between employed arbitrators and their clients. Respected men in the field, and there are many, may have to call on past clients and "sell them" fact to face with the importance of accepting new people. Unions and management have been willing to take longer chances before particularly when the appeal is non-financial and involves a commitment for the future. The point is that any solution must consider the nature of the selection process and its objectives, and not just quantitative needs.

B. *Limiting Board Review: Reorganization Plan No. 5 Revisited*[276]

Concern with the operational process of agencies is not novel. In a speech delivered before Congress, the late President John F. Kennedy

[274] Zack, *op. cit. supra* note 264, at 169.

[275] *Cf.* Fleming, The Labor Arbitration Process 103-106 (Ill. 1965) (many decisions predictable).

[276] Reorganization Plan No. 5 of 1961, H.R. Doc. No. 5 of 1961, H.R. Doc. No. 172, 87th Cong., 1st Sess. (1961).

said of regulatory agencies, "the discharge by the regulatory agencies of the government of the responsibilities that Congress has placed upon them must be a consistent and continuing concern of both the Congress and the President."[277] He listed as his goals: (1) the sharpening of agency responsibility, (2) the reduction of excessive delays and workloads, and (3) the improvement of administrative procedures.[278] This speech was followed by another proposing adoption of Reorganization Plan No. 5 of 1961.[279]

The purpose of the statute was to permit a delegation of unfair labor practice cases from Board members to trial examiners while retaining a certiorari-type review.[280] In substance the plan authorized the Board, in its discretion, to publicly delegate any of its functions (including hearings, determinations, orders, certifications, report, and other actions) to a panel of the Board, individual Board members, *hearing examiners*, or employees of the Board.[281] The Board was to retain the right of discretionary review on its own motion, or that of another, by a vote of one less than a majority of the Board, and limitation of review by the Board (or an employee thereof) or failure to act by the parties was deemed an action of the Board.[282] This aspect of the plan affects the NLRB process in the very sensitive area of the distribution of workload between the regional offices, trial examiners, and Board members, and thus, has an obvious relationship to the problem of time lag. Another reason for considering this proposal is that it flows from the reports of two Congressional committees that made extensive studies of NLRB procedures. The first report was made in 1960 by the U.S. Advisory Panel on Labor-Management Relations Law (Cox Panel) to the Senate Committee on Labor and Public Welfare.[283] The second, was made in 1961, by the Subcommittee on the National Labor Relations Board (Pucinski Report) to the House Committee on Education and Labor.[284] Neither of these reports contained the express language of Reorganization Plan No. 5, but both reports described the delay problem and recommended changes.[285]

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277 107 Cong. Rec. 5847 (1961).

278 *Id.* at 5847-50.

279 H.R. Doc. No. 172, 87th Cong., 1st Sess. (1961).

280 *See* 107 Cong. Rec. 5847-50 (1961).

281 *Id.* §§ (a)-(b) at 2, 3.

282 *Id.* §§ (b), (c) at 2, 3.

283 U.S. Advisory Panel on Labor-Management Relations, 86th Cong. 1st Sess., Report on Organization and Procedure of the National Labor Relations Board (Gov't Print 1960) [hereinafter cited as 'Cox Panel'].

284 Pucinski Report.

285 The Cox Panel stated, "these shocking delays seriously affect the usefulness of

The House of Representatives defeated the plan[286] primarily because of the "broad and vague" nature of the delegation of authority.[287] There is no consensus of opinion currently about such a delegation. Suggestions vary from the delegation of unfair labor practices to trial examiners (as suggested in Reorganization Plan No. 5)[288] to revoking the delegation of representational elections made to the regional offices in 1961.[289] There has also been legislation proposed to remove all unfair labor practice cases from the NLRB, and transfer them to the federal courts.[290]

It terms of criteria developed from the interviews, the plan is feasible. For example, the plan is not substantially different from the present operation of the NLRB from the standpoint of the "political factor." Arguably the delegation of unfair labor practice cases to non-political civil service employees for final determination would place most of the decisions with unbiased "judge-like" personnel. However, the change would not cause such a shift for two reasons. First, although there is some statistical variation as to how many decisions by trial examiners are now upheld by the Board, the evidence indicates the figure is substantial.[291] Second, the Board members would still control the important policy cases by discretionary review as well as standards developed either by the case-by-case or rule making authority. Even though delegation to the trial examiners would leave the allegations of undesirable variation in their abilities unanswered, this problem is not insurmountable if it exists at all. The selection process of the civil

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the National Labor Relations Act," and recommended that Administrator should determine validity of charge with appeal to Board. The Trial Examiner should hear on merits if dispute still existed with limited review by Board, *op. cit. supra* note 283, at 10, 23-24. The Pucinski Report found "long delay in processing . . . renders final labor board decisions almost nugatory," and suggested Board study adopting principle of limited review or, in the alternative, legislation, *supra* at 16, 20.

286 The plan was defeated in the House of Representatives on July 20, 1961 by a vote of 231 to 179. 48 LRRM 77 (1961). *Compare* H.R. REP. NO. 576, 87th Cong., 1st Sess. 3 (1961) (Board can delegate without approval).

287 Either House of Congress has "veto power" over reorganization. See Harris, Congressional Control of Administration 213 (1964).

288 Chairman McCulloch stated the Board still favors Reorganization Plan No. 5, 61 LRR 97 (1966).

289 *See* ABA Sec. Lab. Law, 1964 Proceedings 317-19 (1964).

290 *See* 109 Cong. Rec. 15196-200 (1963) for discussion of H.R. 8246, 88th Cong., 1st Sess. (1963). See also Rothman, "In Search of Improving the Administration of the National Labor Relations Act," 13 Lab L.J. 777, 782-84 (1962) (other proposals).

291 *Compare* General Counsel Ordman's statement that acceptance of Trial Examiners' reports by Board has gone up to 30% (from 25%) in 61 LRR 98 (1966), *with* Chairman McCulloch's testimony that only 22% of reports were rejected in 48 LRRM 78 (1961). Difference in statistics is accounted for in part by parties acceptance.

service and the removal grounds under the Administrative Procedure Act could be used to weed out incompetence.[292]

From the standpoint of impact, the efficiency of this plan has many advantages. Under Reorganization Plan No. 5, the initial complaint would presumably still originate in the Regional Offices with appeal to the OGC. Even though no time saving could be projected in this stage, the time lag between the trial examiner stage and the Board decision could be reduced insofar as finality of decision is concerned. For example, in 1965 the median time to reach the trial examiner's interim report was approximately ten months while it took an additional two months to get a Board Decision.[293] It should be noted that these are *median* figures so that one-half of the cases took longer. If the Board rendered a prompt decision on whether it would review, at least two months could be saved. This would not assume any additional trial examiners since they now hear the cases first. Further, the fact that the Board members would be relieved from de novo review of all cases in which there are exceptions filed would discourage frivolous applications and allow more time for making quick determinations as to whether the Board should grant review. In 1964 the Board handled 865 cases which indicates the volume of the workload being discussed.[294] Thus the plan would have the advantage of lowering the number of cases that are now "mooted out" as well as allowing Board members greater contact with the cases they accept for review. Hopefully, release from caseload pressure would create greater efficiency in case handling.[295] Release from this pressure also might alleviate the necessity of the General Counsel imposing rigid target dates on regional offices which in turn result in settlement pressures in all types of claims.

The strongest argument against the plan is that discretionary review by Board members when coupled with the OGC's review of charges that are rejected by the regional offices might seriously hamper due process. In addition to the fact that lack of due process cannot be substantiated in regard to the OGC's present role, there are two additional reasons that mitigate against this argument. First, Board refusal to review is final action, and, therefore, reviewable by the courts.[296]

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292 Section 11: "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission . . . ." Administrative Procedure Act, 60 Stat. 237 (1947), 5 U.S.C. § 1010 (1958).

293 The median figures from Jan.-June 1965 indicated the period from charge till Trial Examiners' decision was 307 days, and an additional time of 62 days was required till Board decision. NLRB Form M-3a.

294 Chart cited by note 250 *supra.*

295 See Pucinski Report 1682-93 for 1961 evaluation of Board members' efficiency.

296 Reorganization Plan No. 5, H.R. DOC. NO. 172, 87th Cong., 1st Sess. (1961),

Actually this would allow faster review than is now possible since the Board must now handle exceptions on a de novo basis. Second, it is obvious that the Board members must be relieved from the growing caseload if the existing process is to have any meaning at all. The possibility of an internal abuse of due process is dwarfed by the existing facts of staggering caseloads and delay. Even though improvements have taken place, the indications are that under the present system longer delays are inevitable. The courts can check violations of due process, but Board members are helpless to control overuse of adjudication by the parties. The significance of this plan is that it deals with agency operation, and requires analysis based on its impact on the process.

C. *An Approach to the Problem of Accommodating Arbitration and Board Adjudication*

The final example of the relevance of process analysis involves the problems arising out of the interrelationship of arbitration and Board adjudication. Definitive application must await further research. However, an approach to specific problems can be derived from a reevaluation of the current disputes centering around deference to arbitration. Do the preferences of the participants reflect the continuing criticism and assist in evaluating new plans for accommodation? The answer aids in understanding the context from which the criticism evolves, and provides analytical tools to deal with possible reforms. The basic assumptions underlying the criticisms provide a framework from which one may assess the validity of the allegations. It is not enough to say that a certain comment reflects an irrational prejudice, because the comment is only relevant from the particular stance of the evaluator. Criticisms in the complex field of labor relations are seldom susceptible to a "yes or no" evaluation. Certainly this is true of the "in-my-experience" type of comments that are prevalent in labor relations. However, such statements must be analyzed because, as the evaluation of the participants indicates, these attitudes will be translated into actions which may result in compliance or rejection of the laws that attempt to regulate these activities. For example, it is one thing to indicate that the parties shall not select an arbitrator on the basis of personal advantage[297] or provide that an employee shall not be discriminated against for union activity,[298] but it is quite another thing

§ (c) "Should the right to exercise such discretionary review be declined . . . then the action . . . shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board."

297 *See* note 93 *supra.*

298 National Labor Relations Act §§ 8(a)(3), 8(b)(2), 49 Stat. 449 (1935), as

to attempt to enforce the rules without the agreement of the parties involved. Their attitudes constitute the extent of voluntary compliance, or the extent to which such rules may be imposed as well as the sanctions necessary to force compliance. The test to be applied to these attitudes and criticisms is one of relevance. Are these continuing criticisms relevant to the problems of the process? If so, how does this affect consideration of new proposals?

For example, one cannot shunt Judge Hays' views with the comment that his condemnation is too sweeping and undocumented if for no other reason than his comments about arbitrators (as opposed to the process) bear a striking resemblance to comments received from the participants in relation to the selection process. Management concern about ability does not refute his comments that many arbitrators (literally thousands) are wholly unfitted for their jobs; not having the knowledge, training, skill, intelligence, or character,[299] despite the statistics concerning the average arbitrator. Judge Hays opined that a judge should be isolated from a system where he is beholden to his employers.[300] This comment is analogous to those made by the participants who suggested that "fee splitting" was an important consideration in the selection process. Judge Hays stated that arbitrators could deviate from the provisions of a contract and be upheld by the courts.[301] Both union and management lawyers agreed that the present criteria of "drawing his essence from the contract" in regard to judicial review might permit this. One interpretation of Judge Hays' remarks would be that he was stating that a process involving people without the requisite expertise who use extraneous factors to make a decision, or who are guided by personal motivations should not be given carte blanche approval by the judicial system.[302] Is this refuted by the fact that there are skilled arbitrators who are invaluable for specialized problems? Isn't this notion a flamboyant (perhaps exaggerated) way of saying that too much is hidden under the banner of expertise?

Mr. Justice Douglas contended that arbitration performs "functions not normal to courts,"[303] and used as examples of proper considerations "the effect upon productivity of a particular result, . . .

amended 61 Stat. 136 (1947), 29 U.S.C. § 158 (a)(3), (b)(2). See note 232 *supra* and accompanying text.

299 Hays, Labor Arbitration a Dissenting View 112 (Yale 1966).

300 *Ibid.*

301 *Id.* at 80-82. *But see* Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677 (1966) (*contra*, where arbitrator has no authority under collective bargaining agreement).

302 Hays, *id.* at 112.

303 United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960).

consequences to the morale of the ship, [and] his judgment whether tensions will be heightened or diminished."[304] Yet every arbitrator interviewed said this statement not only went beyond what they did, but, what they wanted to do.[305] Management, with their traditional distrust of cooperative ventures, is unlikely to submit to this brand of "industrial justice" whatever the attitude of the courts may be. Official expression of this policy will cause the parties to overemphasize the selection process with its commensurate effect of slowing down the process, and "a fortiori" increasing the costs.

Chairman McCulloch, on the other hand, considered the advantages of arbitration to be flexibility of remedies and application as well as speed.[306] These advantages go to process and not personality. For the process to be workable, institutional arrangements should conform to these advantages, and the process should not be deferred to on the basis of what the parties may consider a disadvantage. For example, deference to arbitration should not be based on the mistaken notion that the arbitrator will by the nature of his occupation know more about a specific problem than the courts. The parties will resist such application through the selection process. This does not prove Judge Hays was right in his solution to the problems of arbitration, but it does indicate that his criticism was relevant. The difficulty with his conclusion is that it ignores the procedural advantages of the institution of arbitration. Although Judge Hays concedes the procedural advantages in arbitration, be concludes that these could be "readily adopted to a public system of justice and made available in our courts."[307] This ignores the flexibility and speed of arbitration as evidenced by the growing desire of the parties to fit arbitration to their needs.[308] Moreover, in 1963, in Judge Hays' circuit, there were over 10,000 cases filed with a median disposition of sixteen months; and even when no court action was involved, the median disposition was thirteen months.[309] Appointment of a master-arbitrator by the courts, even if expedited, could not match the present speed of the arbitration process; and further would add pressure to the existing caseload in the courts. Assuming that speed could be achieved, would Judge Hays provide the variety of forms and limitations of the arbitrator-mediator (for

304 *Id.* at 582.

305 *Compare* Seitz, "Grievance Arbitration and the National Labor Policy," in 18th Ann. Conference on Lab. 201 (BNA 1966) (effulgance of royalty illusory).

306 McCulloch, "The Arbitration Issue in National Labor Board Decisions," 19 Arb. J. (n.s.) 134, 136 (1964).

307 Hays, *op. cit. supra* note 299, at 116.

308 McCulloch, *supra* note 306, at 136. See "1964 Survey," in 1965 Proceedings NAA 248, for figures showing increasing use of the specialized "forms" of arbitration.

309 Dir. of Administrative Office of U.S. Courts, 1963 Ann. Rep. 209 Table C.

example, impartial chairmen)? His answer to this might be the suggestion of "labor courts," but this is based on "special expertise," not speed or flexibility.[310] The expertise goes to personality, and not procedural advantage. Judge Hays' solution would presumably change the selection process (or eliminate it) by moving arbitration to another forum. Even though this paper will not attempt to analyze labor courts, there are several obvious objections to this suggestion. It assumes a dissatisfaction with the process, or a preference for another forum that cannot be substantiated by empirical investigation. The suggestion does not indicate what procedures would be used to discover the arbitrator's ability. Since only one-third of all arbitrators devote full time to this function, there remains the question of the transfer of qualified personnel to serve as master-arbitrators. The labor court alternative presumes the arbitration process cannot function properly under the present system because of what might be termed "personal deficiencies," and yet this is currently being handled by the selection process. Finally, labor courts would destroy the advantage of mutuality in the selection process. These observations may not refute Judge Hays' proposal of labor courts, but suggest that a host of questions must be considered prior to its serious consideration.[311] Moreover, they indicate that Mr. Justice Douglas' evaluation of the arbitration process (as opposed to arbiters) was closer to the participants' evaluation of it. Their increasing use of the process justifies the conclusion that the arbitral forum is effective.

This approach to contemporary criticisms indicates that deference to arbitration should be predicated on an appreciation of the operation of the process as well as an understanding of the impact of deference on it.

IV. Conclusions

Examination of the "preferences and prejudices" of the participants in the labor relations field provides a basis for institutional evaluation. This type of empirical research is not only helpful but necessary for useful analysis, because enforceability of labor laws depends on the acceptance by the parties of the institutions that are created to effectuate statutory policy. Labor policy has as its goal workable institutions that will allow the parties self-government within a framework that will not obstruct the free flow of commerce.

The pragmatic necessity of such arrangements is proved by the growth and use of the arbitral process. Arbitration has inherent problems that are the inevitable result of the competition that now exists

310 Hays, *op. cit. supra* note 299, at 117.

311 *Cf.* Straus, "Labor Arbitration and Its Critics," 20 Arb. J. (n.s.) 197, 209 (1965) (if disabilities are not resolved labor courts may be inevitable).

between unions and management in this country. The selection problem, for example, which is an integral part of ad hoc arbitration has caused delay in the process. In addition, arbitration has become expensive for small unions and small businesses alike. These difficulties, and the critics who point them out, cannot be ignored because arbitration must provide a mutually acceptable unexpensive and speedy process to be of value. The growth of arbitration and the refusal to accept new arbitrators may well negate these advantages. Since the selection process cannot be substantially altered to force "acceptability," long range plans are necessary now to allow a gradual acceptance of new people in the field. This can be accomplished by outside pressures. However, interference with selection that impinges on the reasons for this process may solidify these problems and make the arbitral forum undesirable.

Alternative channels must exist to maximize the freedom and flexibility of arbitration rather than make the process rigid. This is particularly important where public policy, such as the prohibition of unfair labor practices, is involved in disputes. The NLRB which has jurisdiction over such activities has been subjected to dual pressure from legislators and the parties who use it. The preferred vantage point from which to evaluate this institution is the manner in which it currently operates in labor relations, because this indicates whether the parties are accepting the process. The evidence of a strong trend toward growing charges and the resultant futility of Board operation is undeniable. Measures must be taken to halt this trend. The parties have reacted adversely to the concept that the rules developed vary coincidentally with a change in the political party of the executive. This type of fluctuation and instability, rather than the politics involved, make the process vulnerable to abuse by the parties. In addition, weak enforcement of the remedies provided by statue contributes to disregard of the present consequences of violating the laws. Even though the Board and Congress have taken steps to correct inefficiency existing within the structure of the NLRB, further delegation of duties is desirable to fight the increasing time lag.

An understanding of the operational structure of each institution is essential to deal with the interrelationship of arbitration and NLRB adjudication. The problems arising from this interaction should be evaluated within the labor relations context. Process analysis provides a framework within which the existing arrangements can be weighed. The present restricted focus on decisions often fails to acknowledge the impact of the self-serving tendencies of the parties on the decisional process. These tendencies are often evidenced by apparent hostility toward institutions. However, they may also undermine the intended effect of our labor laws by abusing the institutional process.